1 In the United States Circuit Court of Appeals
for the Second Circuit

LILLIAN SPELAR, AS ADMINISTRATRIX OF THE ESTATE OF MARK SPELAR, DECEASED, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Statement pursuant to rule 13

This action was commenced in the District Court of the United States for the Eastern District of New York by the filing of the complaint on April 23, 1947. Service, pursuant to the provisions of the Federal Tort Claims Act, was made on or about April 24, 1947.

Plaintiff appeared by Gerald F. Kinley.

Defendant appeared by J. Vincent Keogh, United States Attorney.

There have been no changes in parties or attorneys since the commencement of the action.

The defendant was at no time arrested; no bail has been taken, and no property has been attached.

The defendant moved to dismiss the action on the ground that the Court lacks jurisdiction, as the claim arose in a foreign country, and upon the ground that the complaint failed to state a claim against the defendant upon which relief can be granted; and for such other and further relief as to the Court may seem just and proper.

2 This motion was heard by Honorable Harold M. Kennedy on June 18, 1947.

The decision and opinion the Court granting the defendant's motion is dated February 4, 1948.

On February 25, 1948, an order was signed by Judge Kennedy granting the motion to dismiss the action on the grounds above stated.

The plaintiff's Notice of Appeal is dated February 26, 1948.

3 In the District Court of the United States for the Eastern District of New York

Civil No. 8019

LILLIAN SPELAR, AS ADMINISTRATRIX OF THE ESTATE OF MARK SPELAR, DECEASED, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

ACTION AT LAW UNDER FEDERAL TORT CLAIMS ACT

Complaint

Plaintiff, for her cause of action against the defendant herein, by and through her attorney, Gerald F. Finley, alleges:

First: That at all times herein mentioned, the defendant was and is a Sovereign Corporation.

Second: That at all times herein mentioned the plaintiff was and still is a citizen of the State of New York residing in the Borough of Queens in the City of New York, within the limits of jurisdiction of the District Court of the United States for the Eastern District of New York.

Third: That at all times herein mentioned the defendant leased, maintained and controlled a certain air base known as Harmon Field in or near Stephenville, Newfoundland.

4 Fourth: That at all times herein mentioned the defendant controlled, supervised and directed all take-offs of aircraft from the said Harmon Field.

Fifth: That on and prior to the third day of October, 1946, Mark Spelar, deceased, was in the employ of American Overseas Airlines, Inc., as a Flight Engineer.

Sixth: That on the third day of October 1946, the said Mark Spelar in the course of his duties as an employee of American Overseas Airlines, Inc., was aboard an aircraft known as a DC 4, U. S. Registry No. NC 90904 at Harmon Field, in or near Stephenville, Newfoundland.

Seventh: That on the third day of October 1946 the defendant, its agents, servants, officers and employees negligently and carelessly ordered, directed and supervised the aforesaid aircraft No. NC 90904 in taking off from Harmon Field in or near Stephenville, Newfoundland.

Eighth: That by reason of the negligence of the defendant in ordering, directing and supervising the take-off of the aircraft,

U. S. Registry No. NC 90901, the aforesaid aircraft was caused to crash into a hill or promontory shortly after the said take-off, and as a result thereof, the said Mark Spelar, was caused to suffer and sustain injuries that resulted in his death.

Ninth: That the negligence of the defendant consisted in directing the said aircraft, U. S. No. NC 90901, to take off on Runway 7 at the time and place aforementioned, in spite of the rising terrain in the flight path thereof and the conditions prevailing at the time of the said take-off; in failing properly to warn the said aircraft No. NC 90901 of the dangers involved in taking off from the said Runway 7 at the time and place above-mentioned, in view of the rising terrain in the flight path thereof and the conditions prevailing at the time of the said take-off; in failing to establish and maintain proper beacons, markers, signals, limitations of flight and other safeguards against the dangers of the surrounding terrain; in failing to require the establishment and maintenance of proper beacons, markers, signals, limitations of flight and similar safeguards against the dangers of the surrounding terrain, in failing to place or have placed proper runway restrictions in the Operating Manuals used by flying personnel at the time and place above-mentioned; in failing to provide proper supervision of operations at Harmon Field and competent persons charged with the supervision of operations at the said Harmon Field; and various other negligent and careless acts in the premises.

Tenth: This action is brought under the United States Statutes and the Federal Tort Claims Act and the jurisdiction of this court depends thereupon.

Eleventh: That the laws of Newfoundland provide in Chapter 213 of the Consolidated Statutes of Newfoundland (3d series):

"1. Whensoever the death of a person shall be caused by any wrongful act, neglect, or default, and the act, neglect, or default, such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony.

"2. Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased."

Twelfth: That heretofore, and on or about the 20th day of January 1947, the Surrogate's Court in the County of Queens in the State of New York duly made its certain decree appointing the plaintiff administratrix of all the goods, chattels and credits which were of the said deceased, Mark Spelar, and the plaintiff is now duly qualified and acting as such administratrix.

Thirteenth: That the plaintiff as the wife of Mark Spelar was entirely dependent on the aforesaid Mark Spelar for support from his earnings.

Fourteenth: That at the time of his death the said deceased was a strong, healthy, able-bodied young man, aged 31 years; was a graduate of high school and of the Pittsburgh Institute of Aeronautics and was a trained mechanic and Flight Engineer; that he was earning and capable of earning approximately four hundred and fifty ($450.00) dollars a month and was sober and industrious.

7 Fifteenth: That by reason of the facts alleged herein, the plaintiff individually and in her capacity as administratrix as aforesaid, was, through the negligence of the defendant, caused loss and damage in the sum of one hundred thousand ($100,000) dollars no part of which has been paid.

Wherefore, plaintiff demands judgment against the said defendant for the sum of one hundred thousand ($100,000) dollars together with the costs and disbursements of this action, and that the Court award her attorney reasonable counsel fees and compensation in the prosecution of this action.

GERALD F. FINLEY,
Attorney for Plaintiff, Office and P. O. Address,
545 Fifth Avenue, New York City.

8 In the United States District Court

Notice of motion to dismiss

SIRS: Please take notice that the defendant herein, United States of America, will move this Court at a Term for Motions to be held at the Federal Court House, 271 Washington Street, Brooklyn, New York, in Room 737, on the 18th day of June 1947, at 10:30 a. m. of that day or as soon thereafter as counsel can be heard, for an order:

1. To dismiss the action on the ground that the Court lacks jurisdiction, as the claim herein arose in a foreign country (28 U. S. C. 943 (k));

2. To dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted; and

3. For such other and further relief as to the Court may seem just and proper.

Dated: Brooklyn, New York, June 9, 1947.

9 Yours, etc.,

J. VINCENT KEOGH,
United States Attorney,
Attorney for Defendant, Office and P. O. Address,
521 Federal Building, Brooklyn, New York.

To GERALD F. FINLEY, Esq.
Attorney for Plaintiff,
545 Fifth Avenue, New York 17, New York.

10 In the United States District Court for the Eastern District of New York

Civil 8019—February 11, 1948.

[Same title]

Appearances: J. Vincent Keogh, United States Attorney for defendant for motion (Frank J. Parker, Chief Assistant United States Attorney, of counsel). Gerald F. Finley, attorney for plaintiff.

Opinion

KENNEDY, D. J. This suit for wrongful death is based upon the Federal Tort Claims Act (28 U. S. C. A. § 943). Plaintiff is the widow of a deceased employee of American Overseas Airline, Inc. She alleges in her complaint that she is a resident of the Eastern District of New York and that on January 20, 1947, she became administratrix of her husband's estate under letters issued by the Surrogate's Court of Queens County. The plane, on board of which decedent was killed, had just taken off from Harmon Field in or near Stephenville, Newfoundland, on October 3, 1946, the date of the fatal accident. And this accident is said to have been due to the negligence of the defendant. It is also al-

11 leged in the complaint that, under the laws of Newfoundland (Consolidated Statutes of Newfoundland, 3rd Series, Ch. 213), an action for wrongful death is created. Upon this statute plaintiff relies. She says that under the Federal Tort Claims Act she has a right to invoke this statutory law of the place where the accident occurred, even though it is not within the territorial limits of the United States, because at the time of the decedent's death, the government was operating the air base at or near which the plane fell, and that the Federal Tort Claims Act provides that her rights are to be determined by the *lex loci delicti.*

Whether or not the Federal Tort Claims Act applies to this situation depends largely upon whether Harmon Field does or does not answer the description "foreign country," because, while the Federal Tort Claims Act constitutes a waiver of sovereign immunity under certain circumstances, the statute itself specifically bars a recovery on any "claim arising in a foreign country" (28 U. S. C. A. § 943 (k)). The government, urging that all of Newfoundland is obviously a foreign country, moves to dismiss the complaint. The plaintiff opposes the motion on the ground that the locale of the accident, even though in Newfoundland, is not a "foreign country" because it is one of the areas covered by a 99-year lease and executive agreement entered into between the British Government and the United States of America on March 27, 1941 (55 Stat. Pt. 2, 1560–1594).

The agreement and lease of March 27, 1941, to which plaintiff refers, was recently carefully considered and analyzed by Judge Clark in this circuit (Connell v. Vermilya-Brown Company, Inc., 2 Cir., 1947, — F. 2d —, decided November 28, 1947). The Connell case involved a claim under the Fair Labor Standards Act (29 U. S. C. A. § 201) by persons who had done construction work at Fort Bell and Kindley Field Bermuda. That area was embraced within the scope of the same lease and executive agreement which relates to Harmon Field in Newfoundland. The Connell complaint was dismissed in the District Court on the ground that, despite the lease and executive agreement, the leased areas of Bermuda did not constitute a "Territory or possession of the United States" within the meaning of the Fair Labor Standards Act. Judgment of dismissal was reversed in the Circuit Court because the lease and executive agreement were construed to embrace such a far-reaching surrender of sovereignty by Great Britain, and acceptance of control by the United States, as to constitute Bermuda a "possession" within the meaning of the act then under consideration.

Clearly, therefore, Harmon Field, the locale of the accident which gave rise to the claim at bar, is, under the Connell case, a "territory or possession of the United States", within the meaning of the Fair Labor Standards Act. Is it also part of a "foreign country" and exempt from the operation of the Federal Tort Claims Act? The solution of the problem is not much advanced by recourse to semantics. For, as the Supreme Court has recognized, the word "country" in the expression "foreign country" is ambiguous (Burnet v. Chicago Portrait Co., 1932, 285 U. S. 1, 76 L. Ed. 587), and now, by virtue of the acquisition of bases in Bermuda, Newfoundland, and elsewhere, the word "foreign" has itself become for some purposes difficult to define, so that the whole expression "foreign country" has lost much of what clarity

13 of meaning it once had. It has been reduced almost to the level of those chameleonlike symbols which, in some statutes, take color only from their background.

Nor is it easy to define the meaning of the statute for purposes of this motion by attempting to discover and carry out the beneficient purposes which led to the enactment of the law. It is perfectly conceivable that the same Congress which would be willing to make applicable to Newfoundland the spreading of employment (the Federal Labor Standards Act) would be quite unwilling to waive sovereign immunity against all tort claims arising in the same area.

I have said that, under the Counel case, Harmon Field in Newfoundland is a "territory or possession of the United States," certainly where fair labor standards are concerned, but in the Federal Tort Claims Act, the expression "Territories and possessions of the United States" is used only once (28 U. S. C. A. § 931), and there in a context which rules out Harmon Field, because that section of the statute confers jurisdiction upon United States district courts "including the United States district courts for the Territories and possessions of the United States." The leased area in Newfoundland has no such courts. Apart from this, there is nothing that I can find in the Federal Tort Claims Act which gives any clear and specific clue concerning the geographical area to which Congress intended the legislation to be applicable, except, as already mentioned, the exemptions found in one section (28 U. S. C. A. § 943) among which is that of any claim arising in a "foreign country."

It seems to me that I have no recourse except to apply the
14 familiar principle that a Congressional waiver of sovereign immunity is to be narrowly construed. And under any narrow construction of the statute, the expression "foreign country" certainly applies to Newfoundland, and even to areas within it over which the United States exercises many, but not all, of the powers of a sovereign.

The result may seem anomalous, I admit. If plaintiff's intestate had been merely underpaid at Harmon Field, he would have had a remedy because it is a "territory" or "possession." Yet, for his death there, even though negligence be established, his widow is, under my construction of the tort statute, without remedy because it is a "foreign country." Plaintiff's claim would have been good if her husband had been killed during a landing in the United States; it is bad merely because he was killed during the takeoff in Newfoundland.

But it may well be that the anomaly is more apparent than real: that rather than subject the United States to claims justiciable

under foreign law, the Congress felt that such suitors should have a remedy only as a matter of grace, subject to such conditions as the Congress might impose, and not as a matter of right, and that this explains its specific refusal to apply a general statute to a claim arising in a "foreign country."

The complaint is dismissed for want of jurisdiction.

HAROLD M. KENNEDY,
United States District Judge.

15 In the United States District Court for the Eastern District of New York

Civil No. 8019

[Same title]

Order granting motion to dismiss

The above-named defendant having moved this Court by notice of motion dated June 9, 1947, for an order dismissing the action because the Court lacks jurisdiction, as the claim herein arose in a foreign country (28 U. S. C. A. 943 (k)), and on the further ground that the complaint fails to state a claim against the defendant upon which relief can be granted, and said motion having duly come on to be heard before me on the 18th day of June 1947, and the defendant having appeared by its attorney, J. Vincent Keogh, United States Attorney for the Eastern District of New York, Frank J. Parker, Chief Assistant United States Attorney, of counsel, in support of said motion, and the plaintiff by her attorney Gerald F. Finley, Esq., having appeared in opposition thereto, and upon the decision of the Court, dated February 11, 1948.

Now, on motion of J. Vincent Keogh, United States Attorney for the Eastern District of New York, attorney for the defendant, it is

Ordered, that the motion of the defendant be and the same hereby is granted.

Dated: Brooklyn, New York, February 25, 1948.

HAROLD M. KENNEDY,
U. S. D. J.

16 In the United States District Court

[Title omitted]

Notice of appeal

Notice is hereby given that the plaintiff above named hereby appeals to the Circuit Court of Appeals for the Second Circuit from the order of Honorable Harold M. Kennedy, entered and filed in the Office of the Clerk of the Eastern District Court on February 25, 1948, which order dismissed the plaintiff's action because the Court lacked jurisdiction, as the claim arose in a foreign country and because the complaint failed to state a claim against the defendant upon which relief could be granted, and the plaintiff appeals from each and every part of said order and any judgment entered or to be entered thereon.

Dated: February 26, 1948.

GERALD F. FINLEY,
Attorney for Plaintiff-Appellant,
551 Fifth Avenue, New York 17, N. Y.

17 In the United States District Court

Stipulation as to record

It is hereby stipulated and agreed that the foregoing is the record of the said District Court in the above-entitled matter, as agreed on by the parties.

Dated: March 19, 1948.

GERALD F. FINLEY,
Attorney for Plaintiff-Appellant.
J. VINCENT KEOGH,
United States Attorney,
Attorney for Defendant-Appellee.

18 [Clerk's certificate to foregoing transcript omitted in printing.]

19 In the United States Court of Appeals for the Second Circuit.

No. 33—October Term, 1948

Argued November 3, 1948—Decided December 8, 1948

Docket No. 21041

LILLIAN SPELAR, AS ADMINISTRATRIX OF THE ESTATE OF MARK SPELAR, DECEASED, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Eastern District of New York

Before L. Hand, Augustus N. Hand and Clark, Circuit Judges.

Action for wrongful death under the Federal Tort Claims Act by Lillian Spelar, as administratrix of the estate of Mark Spelar, deceased, against the United States of America. From an order dismissing the complaint for lack of jurisdiction, D. C. E. D. N. Y., 75 F. Supp. 967, the plaintiff appeals. Reversed and remanded.

20 ARNOLD B. ELKIND,
of New York City (Gerald F. Finley, of New York City, on the brief), for plaintiff-appellant.

FRANK J. PARKER,
Chief Assistant U. S. Attorney, of Brooklyn, N. Y. (J. Vincent Keogh, U. S. Attorney, of Brooklyn, N. Y., on the brief), for defendant-appellee.

Opinion

CLARK, *Circuit Judge*: Does the exclusion from the coverage of the Federal Tort Claims Act of any "claim arising in a foreign country," 28 U. S. C. A. § 943 (k), Revised Title 28, United States Code, § 2680 (k), prevent recovery from the United States of America for wrongful death occurring on a Government airfield in Newfoundland in an area covered by a 99-year lease and executive agreement as a part of the famous "destroyer deal" between Great Britain and the United States of March 27, 1941? In dismissing this action the district court has held that it does. D. C. E. D. N. Y., 75 F. Supp. 967. We are constrained to disagree.

Plaintiff is administratrix of her husband's estate under letters issued by the Surrogate's Court of Queens County, New York.

Her husband was a flight engineer, an employee of American Overseas Airlines, Inc., who was killed by the crashing of his plane just as it had taken off from Harmon Field, in or near Stephenville, Newfoundland, on October 3, 1946. Compare Spelar v. American Overseas Airlines, Inc., D. C. S. D. N. Y., 80 F. Supp. 344. Plaintiff's complaint alleges that his death was due to the negligence of representatives of the United States and that under the laws of Newfoundland, Consol. Stat. of Newfoundland, 3d Ser., c. 213, an action for wrongful death is
21 created, upon which the plaintiff relies as establishing her claim under the Federal Tort Claims Act. The complaint was dismissed below on the defendant's motion for lack of jurisdiction.

The Act as passed in 1946 gave exclusive jurisdiction to the United States district court for the district wherein the plaintiff was resident or wherein the act or omission complained of occurred, "including the United States district courts for the Territories and possessions of the United States," on claims against the United States for death by the negligent or wrongful act or omission of any Government employee while acting within the scope of his employment under circumstances where the United States, if a private person, would be liable to the claimant for such * * * death in accordance with the law of the place where the act or omission occurred." 28 U. S. C. A. § 931 (a). This is continued in the revision, Title 28, United States Code, § 1346 (b), except that here the district courts are spelled out to designate those of Alaska, the Canal Zone, and the Virgin Islands. Since obviously the revision was not intended to limit the coverage, the reference to the original form is of importance, as indicating a congressional recognition of claims in the "possessions" of the United States.

The nature of the 99-year lease and executive agreement entered into between Great Britain and the United States, as set forth in 55 Stat., Pt. 2, 1560-1594, is discussed at some length in Connell v. Vermilya-Brown Co., 2 Cir., 164 F. 2d 924, where we held that the Bermuda base transferred pursuant to this same agreement was a "possession" of the United States within the applicability of the Fair Labor Standards Act. Since the argument of this appeal, the Supreme Court has affirmed that case. Vermilya-Brown Co. v. Connell, S. Ct., Dec. 6, 1948. Although different
22 statutes are involved, it would seem clear that that decision is certainly persuasive, if not well-nigh conclusive, authority for reversal here. It is difficult to believe that an air base which is a possession under one Act is a foreign country, no less, under another. Moreover, in the passage quoted above, Congress appears to have recognized the applicability of

the Act to possessions of the United States. While defendant here did not cite or discuss the Connell case, the district judge below attempted to distinguish it, substantially on the ground that the present statute was not crystal clear and that a congressional waiver of sovereign immunity was to be narrowly construed. This doctrine of "niggardly" construction has been cited to this Act, State of Maryland, to Use of Burkhardt, v. United States, D. C. Md., 70 F. Supp. 982, though we have had occasion to criticize such application. Aetna Cas. & Surety Co. v. United States, 2 Cir., — F. 2d —, —. When after many years of discussion and debate Congress has at length established a general policy of governmental generosity toward tort claimants, it would seem that that policy should not be set aside or hampered by a niggardly construction based on formal rules made obsolete by the very purpose of the Act itself. Particularly should this be true as to the broad terms of coverage employed in the basic grant of liability itself.[1]

In our view, however, the statutory exception referring to "a foreign country" is sufficiently precise and explicit that, even without the Connell precedent, this claim must be held included in the coverage of the Act. The language of the grant to the United States of the area is explicitly that of a definite
23 lease of territory for a particular period. As pointed out in the Connell case, there was also incorporated an extensive grant of judicial jurisdiction and of general powers to carry out the purpose of the cession, namely, the establishment of the air bases. There has been much discussion of the somewhat mystic problem as to how far "sovereignty" has been granted; however that may be decided, it would seem that where the United States constructs, operates, and controls an air base so completely as is the actual fact, so obviously in direct line with the intent of the contracting governments, it is on the whole fantastic to consider this territory a foreign country within the meaning of a local statute affecting the relation of this government and private persons.[2] Moreover, in the light of the statutory purpose here the result seems the same. The only ground suggested for this particular exception is that defense of such claims, including the locating, preserving, and use of evidence, would involve too great a practical problem to make waiver of immunity as to them either

[1] Congress has indicated this policy by its amendment in 1947 to destroy the basis of defenses made by the Department of Justice in actions based on statutes in two states locally defined as only punitive and not remedial in nature; the amendment extends recovery to cover these cases. See 28 U. S. C. A. § 931 (a) as amended Aug. 1, 1947, c. 446, § 1, 61 Stat. 722, and H. R. Rep. No. 748, 80th Cong., 1st Sess., U. S. Code Cong. Serv. 1947, p. 1548.

[2] Compare De Lima v. Bidwell, 182 U. S. 1, 180: "A foreign country was defined by Mr. Chief Justice Marshall and Mr. Justice Story to be one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States. The Ellen, 2 Gall. 4, Fed. Cas. No. 4,346; Taber v. United States, 1 Story 1, Fed. Cas. No. 13,722; The Adventure, 1 Brock. 235, 241, Fed. Cas. No. 93."

fair or feasible. But if this be the reason for the exception—and it seems to us a reasonable explanation—it surely does not exist in the case of a government-owned-and-controlled airbase. Actually with respect to this very accident, there seem to have been the most complete reports and investigations, as would be usual by the Government agencies in such a situation.

The United States Attorney ably and vigorously urges not only the objections we have already noticed, but others, which nevertheless do not persuade us. There seems no difficulty in the
21 reference of the statute back to the local law of the area, here the Newfoundland law which the plaintiff has alleged and plans to prove. Such reliance on foreign law as the source of rights locally enforced is of course not at all unusual in our courts. Nor does it seem of importance that actually the United States has not established any district courts at this air base. We are now particularly concerned with the existence of the right, which must be established before we need turn to the form of remedy. But the remedy here is fully adequate and complete in the alternative provision of the statute as quoted above, allowing venue at the plaintiff's residence as here. Nor do we see any possibility of political complications. The executive agreement is too carefully drawn, it too well adjusts the various rights of the two countries involved, to make it seem possible that any difficulty can arise if the United States pays private claims made against it for negligence at these air bases. Finally, however, one may regard the much discussed issue of the relative scope of the executive agreement as against the treaty, it cannot be escaped here that the cession of the area has actually been made and the fact of grant and occupancy is not challenged by any one. It would certainly be too refined a thesis to deny this plaintiff recovery on the ground that, though the high contracting parties were quite satisfied, the grant was inoperative because it was made pursuant to executive agreement, and not treaty. Were this thesis to be adopted, then indeed this private litigation might have political, if not international, complications vastly embarrassing, one fancies, to this very defendant here.

Reversed and remanded.

In the United States Court of Appeals for the Second Circuit

LILLIAN SPELAR, AS ADMINISTRATRIX, ETC., PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

Judgment

Filed December 8, 1948

Appeal from the District Court of the United States for the Eastern District of New York.

Present: Hon. Learned Hand, Chief Judge, Hon. Augustus N. Hand, Hon. Charles E. Clark, Circuit Judges.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with costs and cause remanded for further proceedings in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL,
Clerk.

[File endorsement omitted]

[Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

Order allowing certiorari

Filed April 18, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 53655. U. S. Court of Appeals, Second Circuit. Term No. 42. The United States of America, Petitioner, vs. Lillian Spelar, as Administratrix of the Estate of Mark Spelar, Deceased. Petition for writ of certiorari and exhibit thereto. Filed March 8, 1949. Term No. 42 O. T. 1949.

NO. [redacted] 42

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1947

UNITED STATES OF AMERICA, Petitioner,

vs.

[redacted], as Administrator of the Estate of
[redacted], Deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.

UNITED STATES OF AMERICA, *Petitioner*

v.

LILLIAN SPELAR, as Administratrix of the Estate of MARK SPELAR, deceased

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled case on December 8, 1948.

OPINION BELOW

The opinion of the United States District Court for the Eastern District of New York (R. 10) is reported at 75 F. Supp. 967. The opinion of the United States Court of Appeals for the Second Circuit (R. 19) is reported at 171 F. 2d 208.

JURISDICTION

The judgment of the Court of Appeals was entered December 8, 1948 (R. 23). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) (1948).

QUESTION PRESENTED

Whether the exclusion from the coverage of the Federal Tort Claims Act of any "claim arising in a foreign country" (28 U. S. C. 2680(k) (1948)) bars, as an unauthorized suit against the United States, an action for wrongful death in accordance with the laws of Newfoundland based on the Government's allegedly negligent operations of an airbase at Harmon, Newfoundland held by the United States under lease from Great Britain.

STATUTE INVOLVED

The Federal Tort Claims Act (60 Stat. 843, 28 U. S. C. 931 (1946) *et seq.*) provided as follows, at the time this action was instituted:[1]

[1] Under the revision of the Judicial Code (Act of June 25, 1948, Pub. Law 773, 80th Cong., 2d sess.), the pertinent sections of the Federal Tort Claims Act are now found in Sections 1346(b), 1402(b), 2674, and 2680 of Title 28, United States Code. The language of Section 410(a) of the Act, formerly 28 U. S. C. 931(a), now 28 U. S. C. 1346(b), was also revised so that it now reads:

> • • • the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the Dis-

SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United

trict Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Respondent's rights, however, are fixed by the law applicable at the time of the institution of her suit.

States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. * * *.

* * * * *

SEC. 421. The provisions of this title shall not apply to—

* * * * *

(k) Any claim arising in a foreign country.

* * * * *

STATEMENT

Lillian Spelar, the respondent, is the administratrix of the estate of her husband, Mark Spelar, a flight engineer employed by American Overseas Airlines, Inc. Mark Spelar was killed on October 3, 1946, when the plane in which he was riding crashed shortly after taking off from Harmon Field, an airbase in Newfoundland. This airbase is one of the areas leased by the United States from Great Britain pursuant to an Agreement and Leases entered into on March 27, 1941, after an Exchange of Notes on September 2, 1940. (See Executive Agreement Serial 235, Leased Naval and Air Bases (GPO, 1942) filed with this Court in connection with *Vermilya-Brown* v. *Connell*,

335 U. S. 377). Respondent brought this action against the United States under the Federal Tort Claims Act in the District Court of the United States for the district in which she resided, alleging that the death of her husband was due to the negligence of the Government in the operation of Harmon Field (R. 3). The complaint set forth the laws of Newfoundland which permit an action by the executor or administrator of a deceased person for death due to negligence (R. 5-6). A motion was made to dismiss the action, one of the grounds being that the court "lacks jurisdiction, as the claim herein arose in a foreign country" (R. 8). The District Court granted the motion (R. 15). On appeal, the Court of Appeals reversed (R. 18), citing this Court's decision in *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, as "persuasive, if not well-nigh conclusive, authority for reversal here. It is difficult to believe that an air base which is a possession under one Act is a foreign country, no less, under another" (R. 20), 171 F. 2d at 209. Moreover, the opinion continues, "where the United States constructs, operates, and controls an air base so completely as is the actual fact, * * * it is on the whole fantastic to consider this territory a foreign country within the meaning of a local statute affecting the relation of this government and private persons" (R. 21), 171 F. 2d at 210.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that an action based on the laws of Newfoundland and arising out of alleged negligence at an air base in Newfoundland leased by the United States was not a claim arising in a foreign country and consequently excepted from the waiver of sovereign immunity contained in the Federal Tort Claims Act.

2. In reversing the order of the district court dismissing the complaint for lack of jurisdiction.

REASONS FOR GRANTING THE WRIT

Largely in reliance upon this Court's decision in *Vermilya-Brown* v. *Connell*, 335 U. S. 377, the court below has held that a cause of action based upon foreign law arising in foreign territory under lease from Great Britain for an airbase is not excluded from the coverage of the Federal Tort Claims Act as a "claim arising in a foreign country." This Court's decision that "possessions," as used in the Fair Labor Standards Act, embraces defense base areas is taken as "well-nigh conclusive" authority on the status of such bases for purposes of general statutory construction. The mechanical application of the holding in *Vermilya-Brown* to a statute completely foreign in purpose and kind to the Fair Labor Standards Act has imposed upon the United States a large potential liability for claims based on

foreign law which Congress specifically intended to exclude from the coverage of the Act.

1. The principle enunciated by this Court in the *Vermilya-Brown* case is that the reach of a statute applicable by its terms to any "possession of the United States" does not depend "upon sovereignty in the political or any sense over the territory" but, the power existing to legislate beyond the limits of national sovereignty, on the purpose intended to be served by the statute (335 U. S. at 381.) The court's duty "is to construe the word 'possession' as our judgment instructs us the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind" (*id.* at 388). Applying this touchstone the Court found, "an intention on the part of Congress in the use of the word 'possession' to have the [Fair Labor Standards] Act apply to employer-employee relationship on foreign territory under lease for bases" (*id.* at 390).

The geographical coverage of a statute was treated by this Court as a problem of statutory construction to be resolved not by assigning any fixed or rigid meaning to the word "possession," which is not "descriptive of a recognized geographical or governmental entity," but by recourse to the legislative intent. Therefore, it by no means follows that because the Fair Labor Standards Act in the light of its purpose is to be considered as having force within the leased areas,

that the Federal Tort Claim Act should be similarly construed. Yet the court below, without making any particular note of the vital differences between the language of the two acts, and without inquiry into the legislative history of the Tort Claims Act which is conclusive on the question of the legislative intent, finds it difficult of belief "that an air base which is a possession under one Act is a foreign country, no less, under another" 171 F. 2d at 209. By considering the *Vermilya-Brown* decision to hold these bases to be "possessions" the court below finds further support for its conclusion that the Tort Claims Act applies to them as the jurisdictional section of that Act which, before its amendment, provided for exclusive jurisdiction "in the United States district courts, * * * including the United States district courts for the Territories and possessions of the United States * * *" Section 410 (a), 28 U. S. C. 931 (a) (1946). In short this Court's decision in *Vermilya-Brown* is treated as defining the content of the word "possession" as including these leased bases regardless of the context in which it is employed.

If the court below had determined the scope of the exception for claims arising in foreign countries by reference to the legislative intent rather than by mechanical reliance upon precedent it would have arrived at a result exactly contrary to that reached. "The term 'foreign country' is not a technical or artificial one and the sense in

which it is used in a statute must be determined by reference to the purpose of the particular legislation" *Borak* v. *Chicago Portrait Co.* 285 U. S. 1, 6.

2. The legislative history of the Federal Tort Claims Act permits no doubt of the legislative purpose to exclude all claims based on foreign law such as the one pressed here. The bill which eventually was passed as the Federal Tort Claims Act was first introduced during the 76th Congress. Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, (1946) 35 Geo. L. J. 3. It excepted "Any claim arising in a foreign country *in behalf of an alien*" (emphasis added).[3] Among the various revisions made at the suggestion of the Department of Justice in the proposed legislation during the course of the 77th Congress, the phrase "in behalf of an alien" was deleted so as to bar all claims arising in foreign countries whether brought by an alien or a citizen. H. R. 6463, 77th Cong., 2d sess.; S. 2221, 77th Cong.,

[3] H. R. 7236, which is the first Tort Claims bill with substantially identical provisions to the present act was introduced in the 1st session of the 76th Congress, was reported favorably by the House Committee on the Judiciary (H. Rep. No. 2428, 76th Cong., 1st sess.), and passed the House (86 Cong. Rec. 12032), but after hearings the Senate Judiciary Committee did not report the companion bill, S. 2690. In the first session of the 77th Congress the bill was reintroduced as H. R. 5291 and H. R. 5373 and referred to the Committee on the Judiciary. No action, however, was taken until the second session of the 77th Congress when a revised draft was introduced (see footnote 4, *infra*).

2d sess. The enlargement of the exception was a natural corollary to the fact that the bill, as revised, in contrast to its forerunners, explicitly subjected liability to determination by the law of the place where the tort occurred. Hearings before the Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d sess., pp. 26, 30, 35, 43, 61. Francis Shea, Assistant Attorney General in charge of the Claims Division, who explained the various changes made in the proposed Tort Claims bill to the House Committee on the Judiciary, said on this point (Hearings, *supra*, p. 35):[1]

> *Mr. Shea*: [ ] Claims arising in a foreign country have been exempted from this bill, H. R. 6463, whether or not the claimant is an alien. Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims arising in this country. This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think to a good deal of difficulty.
>
> *Mr. Robsion*: You mean by that any representative of the United States who committed a tort in England or some other country could not be reached under this?
>
> *Mr. Shea*: That is right. That would have to come to the Committee on Claims in the Congress.

[1] In a study prepared by the Department of Justice on the differences between H. R. 5373, the original bill as introduced in the 1st session of the 77th Congress, and H. R. 6463, the

The exception as revised to exclude all claims arising in foreign countries was contained in all subsequent drafts of the Tort Claims bill and was enacted as part of the Tort Claims Act without further discussion.* Congress clearly was unwilling to "expose the Government to claims predicated on the laws of a foreign country." *Brandl v. United States*, 77 F. Supp. 68, 72 (S. D. N. Y.); *Stranori v. United States*, 77 F. Supp. 240 (E. D. Pa.).

The legislative history of the section conferring jurisdiction of suits under the Act on the district

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revised bill introduced during the second session, incorporated in the report of the hearings held by the House Committee on the Judiciary on the two bills, and in a comparison between the two bills reproduced as Appendix IV to that report, the same explanation of the change as made by Mr. Shea is given. Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d sess., pp. 29, 66.

*The shape of the Federal Tort Claims Act was largely determined during its consideration in the courses of the 77th Congress. Subsequently the bill was reintroduced without substantial modification or further hearings until its enactment during the 79th Congress. After hearings on the Tort Claims bill, the revised version of the bill introduced during the 2d session of the 77th Congress, S. 2221, was reported favorably by both the Senate and House Committees on the Judiciary (S. Rep. No. 1196, 77th Cong., 2d sess.; H. Rep. No. 2245, 77th Cong., 2d sess.), it passed the Senate, 88 Cong. Rec. 3174, but was never considered by the House. It was reintroduced in the 78th Congress (H. R. 1356, 78th Cong., 1st sess.; S. 1114, 78th Cong., 1st sess.), but no action was taken and again in the 79th Congress (H. R. 181, 79th Cong., 1st sess.). It was finally passed as part of the omnibus Legislative Reorganization Act, S. 2177, 79th Cong., 2d sess.

courts of the Territories and possessions contains further evidence of the legislative intention to restrict rather narrowly the geographical coverage of the Act. Section 110(a) 28 U. S. C. 931(a) (1946). Because this section employs the word "possessions," it was heavily relied on by the court below as supporting its construction that the Federal Tort Claims Act, like the Fair Labor Standards Act, extends to the leased bases. Unlike the Fair Labor Standards Act, however, the word "possessions" is used not to indicate the coverage of the Act, but merely as descriptive of the courts in which actions may be brought, and even for that limited purpose was intended most narrowly.

As originally drafted, the Tort Claims bill conferred jurisdiction on the "Court of Claims and the district courts." H. R. 7236 and S. 2690, 76th Cong., 1st sess. When H. R. 7236 was before the House for consideration, Mr. King inquired as to whether "district courts" embraced the District Court of Hawaii (86 Cong. Rec. 12021), and the bill was amended to include that court specifically. As part of the numerous changes made in the bill during the 77th Congress the jurisdictional section was broadened to include the "district courts for the Territories and possessions of the United States." Hearings before the Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d sess., pp. 27, 31, 61. In this form it was passed by the 79th Congress.

In the revision of the Judicial Code, made by the 80th Congress, this language was made even more specific. In place of the blanket reference to the courts of the "Territories and possessions," the district courts outside the continental United States given jurisdiction under the Act are specifically designated. These are those for Hawaii and Puerto Rico, which are not specifically named since they are included in the term "district courts" as used throughout the Act, and those for Alaska, the Canal Zone and the Virgin Islands. 28 U. S. C. 1346(b). The change was explained by the Senate Committee on the Judiciary which made it as follows (Senate Report No. 1559, 80th Cong., 2d sess. (p. 6):

> * * * in at least one of the possessions there are local district courts which are not intended to have tort-claims jurisdiction but which would be included by the general terms of the language which the amendment strikes out. The specific inclusion of the courts of the three remaining Territories and possessions thus makes for clarity and precision.

The Senate Committee on the Judiciary had been the responsible committee during the evolution from the 76th to 77th Congresses of the sections establishing the geographical limits of the Act. Both H. R. 7236, the earliest draft of the present act (86 Cong Rec. 12065), and S. 2221, which contained the sections as revised, and sub-

sequently enacted by the 79th Congress, were referred to it (88 Cong. Rec. 586). It reported the latter favorably (S. Rep. 1196, 77th Cong., 2d sess.). Although in the 79th Congress it was replaced by a Special Committee on the Organization of Congress, the Federal Tort Claims Act being made a part of a general reorganization act, S. 2177 (S. Rep. No. 1400, 79th Cong., 2d sess., p. 29; Hearings before the Joint Committee on the Organization of Congress pursuant to H. Con. Res. 18, 79th Cong., 1st sess.), there can be no doubt, in view of the role played by it in the 77th Congress when the bill crystallized, of its responsibility for the present language. See footnote 4, *supra*. It is therefore of great significance that it did not consider the changes made in the language of the Tort Claims Act during the revision of the Code as doing anything other than expressing the original legislative intention more clearly. *Duplex Co.* v. *Deering*, 254 U. S. 443, 474; *Mitchell* v. *Cohen*, 333 U. S. 411, 421; *United States* v. *Mine Workers*, 330 U. S. 258, 270-282.

That intention, as the Senate Committee saw it, had been not to include even all the recognized possessions within the broad designation of the "district courts of the Territories and possessions." An intention to exclude even such recognized possessions as the guano islands, Guam and Samoa from the "possessions" whose courts were given jurisdiction is clearly inconsistent with an

intention by the use of that word to embrace areas held only under lease.

3. Even were the congressional intent less clearly defined than it is by the legislative history, it would be unlikely that Congress intended to subject the United States to the law of the scores of jurisdictions in which the Government might find itself by permitting suit to be brought wherever local law established liability. By holding the Fair Labor Standards Act to be applicable to the leased bases, this Court extended to these areas the benefits of our national policy regarding conditions of employment; application of the Federal Tort Claims Act to the same areas would have the exactly contrary effect of subjecting the United States to the policies of other nations concerning tort liability.

The exclusion of claims arising in foreign countries from the jurisdiction given the district courts of suits against the United States was intended to bar all claims based on foreign law. Respondent's complaint, which explicitly relies on the laws of Newfoundland [5] as establishing the cause

[5] There can be no question of the applicability of the laws of Newfoundland to the Harmon Base. Specific provision is made in the leasehold terms to secure limited exemptions for the base personnel from certain aspects of that law, as for example the tax (Article XVII), immigration (Article XIII) and customs (Article XIV) laws. Other provisions similarly evidence the acceptance by both contracting parties of the dominion of the territorial laws over the leased areas such as

of action was properly dismissed by the district court as outside its jurisdiction. *Brandt* v. *United States*, 77 F. Supp. 68 (S. D. N. Y.) (Sarpani); *Strauch* v. *United States*, 77 F. Supp. 240 (E. D. Pa.) (Ghent, Belgium); *Brewer* v. *United States*, 79 F. Supp. 405 (N. D. Cal.) (Okinawa); *Leibardt* v. *United States*, decided June 22, 1948 (S. D. Cal.) (occupied zone of Germany); *Donahey* v. *Ishbrandtsen Co.*, 80 F. Supp. 180 (S. D. N. Y.) (Japan). See also *Reid* v. *United States*, 211 U. S. 529, 539; *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371; *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353; *Minnesota* v. *United States*, 305 U. S. 382, 388.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

March 1949

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that securing a right of audience for United States counsel in the territorial courts whenever a member of the United States forces is made a party to a legal proceeding because of his official acts (Article VII), that providing for service of local process (Article VI), and that waiving the motor vehicle tax on vehicles belonging to the United States (Article XII). Executive Agreement Series 235, Leased Naval and Air Bases (GPO, 1942).

No. 42

In the Supreme Court of the United States

October Term, 1949

UNITED STATES OF AMERICA, PETITIONER,

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 42

UNITED STATES OF AMERICA, PETITIONER

v.

LILLIAN SPELAR, AS ADMINISTRATRIX OF THE ESTATE OF MARK SPELAR, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the United States District Court for the Eastern District of New York (R. 5) is reported at 75 F. Supp. 967. The opinion of the United States Court of Appeals for the Second Circuit (R. 10) is reported at 171 F. 2d 208.

JURISDICTION

The judgment of the Court of Appeals was entered December 8, 1948 (R. 14). The petition

for a writ of certiorari was filed on March 8, 1949, and was granted on April 18, 1949. 336 U. S. 950. The jurisdiction of this Court rests upon 28 U. S. C. 1254(1) (1948).

QUESTION PRESENTED

Whether the exclusion from the coverage of the Federal Tort Claims Act of any "claim arising in a foreign country" (28 U. S. C. 2680(k) (1948)) bars, as an unauthorized suit against the United States, an action for wrongful death in accordance with the laws of Newfoundland based on the Government's allegedly negligent operations of an air base at Harmon, Newfoundland held by the United States under agreement with Great Britain.

STATUTE INVOLVED

The Federal Tort Claims Act (60 Stat. 842, 843, 28 U. S. C. 931 (1946) *et seq.*) provided as follows, at the time this action was instituted: [1]

[1] Under the revision of the Judicial Code (Act of June 25, 1948, Pub. Law 773, 80th Cong., 2d sess.), the pertinent sections of the Federal Tort Claims Act are now found in Sections 1346(b), 1402(b), 2674, and 2680 of Title 28, United States Code. The language of Section 410(a) of the Act, formerly 28 U. S. C. 931(a), now 28 U. S. C. 1346(b), was also revised so that it now reads:

> • • • the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States

Sec. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. * * *

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if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred

Respondent's rights, however, are fixed by the law applicable at the time of the institution of her suit.

Sec. 421. The provisions of this title shall not apply to—

* * * * * *

(k) Any claim arising in a foreign country;

* * * * * *

STATEMENT

Lillian Spelar, the respondent, is the administratrix of the estate of her husband, Mark Spelar, a flight engineer employed by American Overseas Airlines, Inc. Mark Spelar was killed on October 3, 1946, when the plane in which he was riding crashed shortly after taking off from Harmon Field, an air base in Newfoundland.[2] This air base is one of the areas leased by the United States from Great Britain pursuant to an Agreement and Leases entered into on March 27, 1941, after an Exchange of Notes on September 2, 1940. See Executive Agreement Serial 235, Leased Naval and Air Bases (GPO, 1942) filed with this Court in connection with *Vermilya-Brown Co. v. Connell*, No. 22, October Term, 1948, 335 U. S. 377).

[2] In consequence of this same accident a number of other actions have been brought in the district courts whose disposition is dependent upon the determination of this case. *Betty Jane Barry, Admx. v. United States*, Civil No. 3091 (M. D. Pa.); *Margaret E. Lehr v. United States*, Civil No. 8595 (E. D. N. Y.); *Estelle A. Lewis v. United States*, Civil No. 8597 (E. D. N. Y.); *Anita M. Tierney v. United States*, Civil No. 8596 (E. D. N. Y.); *Elizabeth Z. Westerfield, Admx. v. United States*, Civil No. 43-526 (S. D. N. Y.); *Hazel P. Bell, Exrx. v. United States*, Civil No. 43-540 (S. D. N. Y.).

Respondent brought this action against the United States under the Federal Tort Claims Act in the District Court of the United States for the district in which she resided, alleging that the death of her husband was due to the negligence of the Government in the operation of Harmon Field (R. 2).[3] The complaint set forth the laws of Newfoundland which permit an action by the executor or administrator of a deceased person for death due to negligence (R. 3). A motion was made to dismiss the action, one of the grounds being that the court "lacks jurisdiction, as the claim herein arose in a foreign country" (R. 4).[4] The District Court granted the motion (R. 8). On appeal, the Court of Appeals reversed (R. 10-14), citing this Court's decision in *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, as "persuasive, if not well-nigh conclusive, authority for reversal here. It is difficult to believe that an air base which is a possession under one Act is a foreign country, no less, under another" (R. 11), 171 F. 2d at 209.[5]

[3] Respondent also brought an action in the United States District Court for the Southern District of New York based on the laws of Newfoundland against the American Overseas Airlines, Inc., for deceased husband's employer. The court held there that the decedent was at the time of his death within the coverage of the New York Workmen's Compensation Law (N. Y. Consol. Laws, Ch. 67, Sec. 1, *et seq.*) and that this Act provides the exclusive remedy against the Airline for the death of the decedent. *Spiller* v. *American Overseas Airlines, Inc.*, 80 F. Supp. 344.

[4] Since institution of this action Newfoundland has become a province of Canada. N. Y. Times, April 1, 1949, p. 10, col. 5.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that an action based on the laws of Newfoundland and arising out of alleged negligence at an air base in Newfoundland leased by the United States was not a claim arising in a foreign country and consequently excepted from the waiver of sovereign immunity contained in the Federal Tort Claims Act.

2. In reversing the order of the district court dismissing the complaint for lack of jurisdiction.

SUMMARY OF ARGUMENT

A. *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, and *Foley Brothers* v. *Filardo*, 336 U. S. 281, as we read them, hold that in the absence of anything to the contrary it will be assumed that Congress intends a statute to apply only within the territorial jurisdiction of the United States, but that the use of the word "possessions" in the Fair Labor Standards Act, read in relation to the purposes of that statute, was thought to manifest an intention to reach such places as the leased bases.

The Tort Claims Act does not contain any language indicating an intention to enlarge coverage beyond the normal territorial scope. The Act does contain the word "possessions", but only in the phrase "United States district courts for the Territories and possessions". Since there are no United States district courts for the leased bases, it is clear that the word "possessions" in the Tort

Claims Act does not extend to them, whatever may be its meaning in other legislation.

Furthermore, the Tort Claims Act is explicitly made inapplicable to "any claim arising in a foreign country", which as a textual matter would apply to the leased areas. Any doubts as to this are resolved by the legislative history of the Act.

B. The Act's legislative history discloses that in excluding "any claim arising in a foreign country" from its coverage Congress intended to bar all claims based on foreign law. During the course of this history the character of the Act changed from a measure providing a narrow, primarily administrative, remedy, rigidly defined by Congress to one making available as broad a judicial remedy as local law allowed. The exception for claims arising in foreign countries was a concomitant of this change.

The word "possession" in the phrase conferring jurisdiction upon the district courts of the Territories and possessions of suits brought under the act is not descriptive of the geographical coverage of the Act but was intended only to identify the courts in which action may be brought. Even for that purpose it is intended most narrowly. This is shown by the fact that in amending the Judicial Code in 1948 the Senate Committee on the Judiciary deleted the phrase "Territories and possessions" and specifically designated in which of the possessions the district courts were given jurisdiction under the Act.

C. When Congress enacted the Federal Tort Claims Act, the United States was already in possession of the bases. When Congress intended in legislation passed contemporaneously to embrace these areas it used language specifically calculated to that end. Examples of this are the Defense Base Act, the War Damage Act, and the Foreign Claims Act. The failure in the Federal Tort Claims Act to distinguish the defense bases from other foreign territory is persuasive that Congress did not intend to differentiate between claims arising in these bases and others based upon foreign law.

D. The unwillingness of Congress to have tort actions determined by foreign law is reflected in two other acts contemporaneous with the Federal Tort Claims Act. In connection with amending the Foreign Claims Act, which authorizes the administrative settlement of claims based on acts of the armed forces arising in foreign countries, including specifically areas under the temporary or permanent jurisdiction of the United States, Congress, in order to permit the War Department to adopt its own regulations, repealed earlier legislation which would have compelled claims arising in certain areas to be determined by foreign law. In the Defense Base Act Congress replaced local law at the defense base areas, in the field of tort claims against private citizens based on the master-servant relationship, by a workmen's compensation law.

ARGUMENT

The Federal Tort Claims Act Is Not Applicable to Claims Arising in the Leased Bases

A. THE TEXT OF THE STATUTE.

In *Foley Bros. v. Filardo*, 336 U. S. 281, 285, this Court reaffirmed that "The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States * * * is a valid approach whereby unexpressed congressional intent may be ascertained." *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, was differentiated on the ground that "by specifically declaring that the Act covered 'possessions' of the United States, Congress directed that the Fair Labor Standards Act applied beyond those areas over which the United States has sovereignty and was in effect in all 'possessions.' This Court concluded that the leasehold there involved was a 'possession' within the meaning of the Fair Labor Standards Act."

The principle which we draw from the two decisions is that in the absence of anything to the contrary it will be assumed that Congress intends a statute to apply only within the territorial jurisdiction of the United States, but that the use of the word "possessions" in the Fair Labor Standards Act, read in relation to the purposes of that statute, was thought to manifest an intention to reach such places as the leased bases, over which

the United States had a substantial measure of control.

Application of this approach to the Federal Tort Claims Act might well lead to the conclusion that it does not extend to the leased bases even apart from the exception for "foreign countries" and the legislative history. For the scope of the statute is stated in general terms—"any claim against the United States"—just as was the statute involved in *Foley Bros.* v. *Filardo*—"every contract made to which the United States * * * is a party." There is no word or phrase indicating an intention to enlarge coverage beyond its normal territorial scope, such as the Court found in the word "possessions" in the Fair Labor Standards Act.

The Tort Claims Act does contain reference to "Territories and possessions", the same phrase found in the Fair Labor Standards Act, but in a different context and obviously with a narrower meaning. The phrase "United States district courts for the Territories and possessions of the United States" does not define the territorial scope of the statute, as in the Fair Labor Standards Act, but the district courts in which suits may be brought. Since the leased bases are not possessions in which there are United States district courts, it is clear that the word "possessions" in the Tort Claims Act does not extend to them, whatever may be its meaning in other legislation. The *Vermilya-Brown* case itself recognizes that the word "possessions" is not a word of art, and may have dif-

erent meanings in different contexts. 335 U.S. 386. Cf. *Steinbach* v. *Mo Hock Ke Lok Po*, 336 U.S. 368, 378-379; *Piedmont & Northern Ry.* v. *Interstate Commerce Commission*, 286 U.S. 299, 312.

Thus even if coverage were to be determined by the meaning of the word "possessions" as used in this particular statute, the result would be different from the *Vermilya-Brown* case. But fortunately Congress was more explicit in this statute, for it expressly provided that the Act should not apply to "any claim arising in a foreign country," certainly, as a textual matter, a leased area in Newfoundland is in a foreign country. That the leased bases are in "foreign" countries seems to be recognized in the *Vermilya-Brown* opinion, which not only accepted the view of the State Department that the leased areas were under British sovereignty, but characterized them as "foreign territory" (335 U.S. at 380, 390).

It is, of course, true that the United States has a substantial amount of control over the leased areas, and that they differ from other foreign soil in that respect. But the control which this country has over the leased areas is substantially less than that enjoyed in territories now under military occupation. Yet the district courts to which the question has been presented have uniformly dismissed claims arising in such areas as arising in a foreign country and therefore outside the scope of the Federal Tort Claims Act. *Brandl* v. *United States*, 77 F. Supp. 68 (S.D. N.Y.) (Saipan, under mili-

tary occupation); *Strauss v. United States*, 77 F. Supp. 240 (E.D. Pa.) (Port of Ghent, Belgium, then under control of the military forces of the United States); *Brewer v. United States*, 79 F. Supp. 405 (N.D. Cal.) (Okinawa, under occupation by American military forces); *Donahey v. Ishimatsu Co.*, 80 F. Supp. 180 (S.D. N.Y.) (Japan); *Lanhardt v. United States*, decided June 22, 1948, unreported (S.D. Cal.) (American occupied zone of Germany).

If there should be any doubt as to whether the leased bases should be deemed "in a foreign country", that doubt is resolved by the history of the phrase in the Tort Claims Act. This demonstrates that the phrase was included in the statute in its present form in order to preclude claims based upon foreign law, such as we have in this case. In addition, it is significant that the United States was in possession of the bases at the time the Tort Claims Act was enacted, and that in other contemporaneous legislation Congress used language specifically applicable to the bases.

We now turn to a detailed statement of the legislative history of the Tort Claims Act insofar as it bears upon this problem.

B. THE LEGISLATIVE HISTORY OF THE FEDERAL TORT CLAIMS ACT SHOWS THAT CONGRESS DID NOT INTEND THE ACT TO APPLY TO THE LEASED AREAS

Passage of the Federal Tort Claims Act in 1946 represented the culmination of years of unsuccess-

ful attempts through various Congresses to give effective recognition to the responsibility of the United States for torts committed by its representatives. During the course of this long legislative history the Tort Claims bill took the shape in which, with some changes not relevant here, it was ultimately enacted by the 79th Congress.

The legislative history of the Act falls into two distinct periods: the first starting with the 65th Congress and ending with the 74th, during which attention was focused on establishing administrative remedies for personal injury and property damage claims against the United States under rules of law established by Congress with only limited access to the courts, and a second, commencing with the 76th and ending with the enactment of the bill, during which the emphasis shifted from defining new remedies to making available whatever judicial remedies existed under the law of the place where the tort occurred. The exception for claims arising in a foreign country was the product of this second period, a concomitant of the shift from a narrow remedy, circumscribed and defined by Congress, to a judicial remedy as broad as local law allowed.

The first fruits of the efforts started in the 65th Congress[1] to provide a more satisfactory system

[1] In the third session of the 65th Congress Congressman French introduced H. R. 14737 authorizing the heads of departments to settle tort claims with a right of appeal to the Court of Claims and to review by the Supreme Court in claims exceeding certain minimum amounts. He reintroduced

for redressing Government torts than that provided by private bills was the passage in 1922 of an act, popularly called the Small Tort Claims Act.[5] This Act authorized the administrative settlement of property claims up to $1,000. Act of December 28, 1922, 42 Stat. 1066. Under it claims arising in foreign countries such as Turkey, China, Newfoundland, or Danzig pressed by either an alien or a citizen were settled in the same way as those arising territorially.[6]

Because of the acknowledged inadequacy of this Act and the limited relief afforded by it both to claimants and Congress, efforts continued to be made to have Congress enact a more liberal measure enlarging the amount which might be awarded for property damage, affording a remedy for personal injury, and granting limited access to the courts. Bills for that purpose were introduced in every Congress from the 68th to the 74th.[7]

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virtually the same measure in the 66th and 67th Congresses H. R. 4829, 66th Cong., 1st sess.; H. R. 62, 67th Cong., 1st sess. None of these bills ever left the Committee on the Judiciary to which they were reported. The first proposal to receive serious consideration was the much narrower bill introduced by Congressman Underhill, H. R. 7912, 67th Cong., 1st sess., which became the Small Tort Claims Act.

[6] Both the War and Navy Departments, under the authority of the Small Tort Claims Act, settled and reported to Congress claims of both aliens and citizens arising in foreign countries. H. Doc. 115, 68th Cong., 1st sess., p. 4 (China), p. 5 (Turkey, Canada); H. Doc. 275, 68th Cong., 1st sess., p. 3 (Haiti); H. Doc. 176, 69th Cong., 1st sess., p. 4 (Danzig); H. Doc. 640, 69th Cong., 2nd sess., p. 10 (England); H. Doc. 426, 71st Cong., 2nd sess., p. 5, 7 (China); H. Doc. 692, 71st Cong., 3rd sess., p. 5 (China). See also, documents cited footnote 16, *infra*.

[7] Through the bulk of these measures, set out in footnote 11, *supra*, a common thread can be traced. Three measures, however, introduced during this first period fall outside the

The earliest measure of this character on which favorable action was taken,[7] S. 1912, introduced and passed by the Senate during the 1st session of the 69th Congress (67 Cong. Rec. 5607) was simply an enlargement of the Small Tort Claims Act. S. Rept. 14, 69th Cong., 1st sess. The House, when the bill was referred to it, substituted under the same number its own measure prepared by the Committee on Claims which was to set the pattern for all subsequent bills during this first period. H. Rept. 667, 69th Cong., 1st sess.; 67 Cong. Rec. 11099.[8] Property damage and personal injury claims were handled separately. Property damage claims up to $5,000 in amount were to be settled administratively; above that jurisdiction over them was conferred on the district courts and the Court of Claims.[9] Personal injury claims were to be de-

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common pattern. H. R. 16062, 66th Cong., 3rd sess.; H. R. 8914, 69th Cong., 1st sess.; H. R. 8561, 73rd Cong., 2nd sess. Each of these bills waived sovereign immunity to suit on tort claims. All died in committee and none appeared to have influenced contemporary thinking. Consequently, no other reference is made to them in this brief.

[7] During the 2d session of the 68th Congress two measures (H. R. 12178 and H. R. 12179) were introduced to provide a remedy for claims for personal injuries. They died in committee.

[8] When the House received the Senate bill it was engaged in considering H. R. 8651—which had been reported favorably by the House Committee on Claims. H. Rept. 209, 69th Cong., 1st sess. This was one of two virtually identical bills. H. R. 6716 was the other, introduced by Congressman Underhill, chairman of the Committee on Claims, who had also been the sponsor of the Small Tort Claims Act. The House had H. R. 8651 on the table (67 Cong. Rec. 11111) after the Committee on Claims reported S. 1912, amended so as to practically duplicate H. R. 8651. H. Rept. 667, 69th Cong., 1st sess.

termined by the United States Employees' Compensation Commission with no right of review or suit in the courts. Specific provisions governed such matters as the effect to be given contributory negligence, intoxication, aggravation of the injury through failure to secure medical care, and the order of distribution of death benefits (Secs. 201, 204, 205). Similar provisions were thereafter inserted in every subsequent bill of this period.[10] Certain types of claims for property damage and personal injury were specifically excepted from the coverage of the bill, such as those arising out of the carriage of the mail or the actions of the Alien Property Custodian. (Secs. 8(a), 208.) A similar, although varying, list of exceptions was also to appear in every bill thereafter introduced.[11] None during this first period, however, contained an exception based either on alienage or the place of origin of the claim.

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[10] See footnote 11, *infra*.

[11] In the following list the sections similar to Secs. 201, 204 and 205 of S. 1912 are given first, and those similar to Secs. 8 and 208, second: H. R. 9285, 70th Cong., 1st sess., Secs. 201, 204, 205—4(a), 208; S. 4377, 71st Cong., 2nd sess., Secs. 201, 204, 205—4(a), 208; H. R. 15428, 71st Cong., 3rd sess., Secs. 201, 204, 205—4(a), 208; H. R. 16429, 71st Cong., 3rd sess., Secs. 23(c), 24, 25—3, 27; H. R. 17168, 71st Cong., 3rd sess., Secs. 201, 203(c), 204, 205—3(a), 207; H. R. 106, 72nd Cong., 1st sess., Secs. 201(b), 203(c), 204, 205—3(a), 207; H. R. 5065, 72nd Cong., 1st sess., Secs. 201(b), 201(c)—203, 204—206; H. R. 9263, 72nd Cong., 1st sess., Secs. 2(b), 2(g), 3(a), 4, 5—6; S. 211, 72nd Cong., 1st sess., Secs. 201(b), 201(c)—206; S. 4567, 72nd Cong., 1st sess., Secs. 201(b), 201(c), 203, 204—206; S. 1833, 73rd Cong., 1st sess., Secs. 201, 203—206; H. R. 120, 73rd Cong., 1st sess., Secs. 2(b), 2(g), 3(a), 4, 5—6; H. R. 2028, 74th Cong., 1st sess., Secs. 2(b), 2(g), 3(a), 4, 5—6; S. 1043, 74th Cong., 1st sess., Secs. 201, 203, 204—206.

Due to the inaction of the Senate the bill, as revised and passed by the House (67 Cong. Rec. 11110), failed of passage in the 69th Congress. A pocket veto prevented a modified version, from which the Senate had eliminated the right of suit in the courts, from becoming law during the 70th Congress.[12] Of the thirteen bills introduced in the next four Congresses only three even reached the floor and no action was taken on these. With the 75th Congress, in which no bills in this field were introduced, the attempts at passage of a tort claims act were temporarily abandoned.[13]

[12] S. 1912, as revised in the House during the 69th Congress, was reintroduced virtually unchanged by Congressman Underhill in the 1st session of the 70th Congress as H. R. 9285. H. Rept. No. 286, 70th Cong., 1st sess. It passed the House (69 Cong. Rec. 3179) and was referred to the Senate Committee on Claims. That committee changed it very substantially. The right of suit in the courts was eliminated, and very extensive powers were given to the General Accounting Office which was authorized to settle claims up to $1,000 for property loss and damage, subject only to review by certiorari in the Court of Claims, and to audit and settle, without further review, claims for personal injury or death up to $7,500 after receiving the report and recommendation of the United States Employees' Compensation Commission. S. Rept. 1699, 70th Cong., 2d sess. Because the Comptroller General, in addition, was placed in charge of appeals to the Court of Claims from his own decisions the bill, which passed both houses (70 Cong. Rec. 4836, 4839), was vetoed by President Coolidge. 70 Cong. Rec. 295 (Part 6, Index). H. Rept. No. 2800, 71st Cong., 3rd sess. McGuire, *Tort Claims Against the United States*, 19 Geo. L. J. 133, 134, 135.

[13] From the 71st to the 74th Congress thirteen bills, modeled more or less on the act vetoed by President Coolidge, were introduced. Four gave a right of review in the Court of Claims on claims up to $1,000 and a right of suit over that amount: H. R. 10429, 71st Cong., 3rd sess.; H. R. 17168, 71st Cong., 3rd sess.; H. R. 106, 72nd Cong., 1st sess.; H. R. 9263, 72nd Cong., 1st sess. The remainder, however, rejecting, as vetoed act in affording as the only judicial relief a right

When the attack on the available procedure for the redress of tort claims against the Government was renewed in the 1st session of the 76th Congress, it was with a substantially revised measure, introduced in the House as H. R. 7236, and in the Senate as S. 2690, drafted by the Department of Justice in collaboration with other government agencies and with the support of the American Bar Association. Hearings before the Committee on the Judiciary, House of Representatives, 77th Cong., 2nd sess., on H. R. 5373 and H. R. 6463 (hereinafter referred to as "Hearings"), p. 41. This new measure substituted for the elaborate structure of administrative and legal remedies found in the previous bills a simple right of suit against the United States in the "Court of Claims and the district courts" for property damage or personal injury caused by the fault of a Government official or employee while acting within the scope of his employment. It continued the authority of administrative agencies under the Small Tort Claims Act to settle claims of less than $1,000, extending it to include claims for personal injury. Although the new legislation differed radically from its predecessors, several of the features of the bills common to the first period were carried

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to review the administrative award by certiorari in the Court of Claims. These bills are listed in footnote [illegible] *supra*. In the 71st Congress two were reported favorably (S. 4377, reported in S. Rept. 700, 71st Cong., 2nd sess., H. R. 17168, reported in H. Rept. 2800, 71st Cong., 3rd sess.), only one in the 72nd Congress (S. 4567, reported in S. Rept. 658, 72nd Cong., 1st sess.), and none thereafter reached the floor.

over, such as those barring recovery for injuries due to contributory negligence, intoxication or wilful conduct, establishing the order of distribution of compensation for death, and governing aggravation of damages. Secs. 204, 302, and 304. Like its predecessor the bill also contained a list of exceptions to which had been added for the first time, however, "Any claim arising in a foreign country in behalf of an alien." Section 303 (12). The legislation, after being reported favorably after hearings by the House Judiciary Committee (H. Rept. 2428, 76th Cong., 3rd sess.), passed the House (86 Cong. Rec. 12032), but failed to be considered by the Senate before the close of the session.

Between the 1st session of the 77th Congress, when the tort claims bill was reintroduced in the form in which it had passed the House of Representatives in the preceding Congress (H. R. 5373), and the 2nd session, further work was done on the proposed legislation within the Department of Justice and numerous changes were made. The revised version, introduced as H. R. 6463 and S. 2221, differed from its predecessors principally in the emphasis placed on local law.[14] Recovery on claims against the United States was to be allowed "under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury or death, in accord

[14] Two other bills which died in committee were introduced during this period. H. R. 5299, 77th Cong., 1st sess., S. 2207, 77th Cong., 2d sess. Both were minor variations of the other bills then under consideration.

ance with the law of the place where the act or omission occurred." (Secs. 201, 301.) Because local law was to determine not only the validity of the claim but also the defenses to it and other incidental matters, the revised measure omitted the provisions found in the prior bills governing such points.[15]

As a corollary to these changes making local law decisive, the phrase "in behalf of an alien" was eliminated from the exception so as to bar all claims "arising in a foreign country" brought by an alien or a citizen. The purpose of this deletion was to prevent claims from being governed by foreign law. Francis M. Shea, Assistant Attorney General in charge of the Claims Division, who explained the various changes made in the proposed Tort Claims bill to the House Committee on the Judiciary, said on this point (Hearings, *supra*, p. 35):

> *Mr. Shea:* * * * Claims arising in a foreign country have been exempted from this bill,

[15] In a memorandum submitted by Mr. Shea, Assistant Attorney General, to the Committee on the Judiciary of the House of Representatives in the course of the hearings it held on the Tort Claims bill, this is set out explicitly, as follows (Hearings, p. 27):

> (2) Conformance to local law is called for by H. R. 6463, not only in respect of the merits of the claim, but also in respect of the availability of defenses and the distribution or disposition of the recovery in cases of death. Hence, such provisions in H. R. 5373 as those concerning distribution of compensation for death (sec. 204), defenses of contributory negligence or willful misconduct (sec. 302), aggravation of damages (sec. 304), and payment of recovery in case of death pending the determination (sec. 308) are omitted as unnecessary.

See also Hearings, p. 61.

H. R. 6463, whether or not the claimant is an alien. Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims arising in this country.[16] This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think to a good deal of difficulty.

Mr. Robsion: You mean by that any representative of the United States who committed a tort in England or some other country could not be reached under this?

Mr. Shea: That is right. That would have to come to the Committee on Claims in the Congress.[17]

The exception as revised to exclude all claims arising in foreign countries was contained in all subsequent drafts of the Tort Claims bill and was enacted as part of the Tort Claims Act by the 79th Congress without further discussion.[18] Even with-

[16] Congress was aware, at this time, that claims were arising outside the United States and in the defense base areas. Such claims were included in the reports being submitted to Congress contemporaneously of claims settled under the Small Tort Claims Act. H. Doc. 790, 77th Cong., 2nd sess., pp. 48, 65, 66, 68, 104 (Newfoundland), p. 68 (British West Indies); S. Doc. 174, 77th Cong., 2nd sess., pp. 24, 26 (Newfoundland); S. Doc. 265, 77th Cong., 2nd sess., p. 17 (Newfoundland).

[17] In a study prepared by the Department of Justice on the differences between H. R. 5373, the original bill as introduced in the 1st session of the 77th Congress, and H. R. 6463, the revised bill introduced during the second session, incorporated in the report of the hearings held by the House Committee on the Judiciary on the two bills, and in a comparison between the two bills reproduced as Appendix IV to that report, the same explanation of the change as made by Mr. Shea is given. Hearings on H. R. 5373 and H. R. 6463 pp. 29–66.

[18] The shape of the Federal Tort Claims Act was largely determined during its consideration in the course of the 77th Congress. Subsequently the bill was reintroduced without

out the explanation given by Mr. Shea for the exclusion of claims arising in foreign countries, the exception of all actions based upon foreign law can be understood as a concomitant of the change in the character of the measure, from one providing a narrow remedy rigidly defined by Congress to one making available whatever rights local law gave against private individuals.[19]

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substantial modification or further hearings until its enactment during the 79th Congress. The revised version of the tort claims bill introduced during the 2d session of the 77th Congress, S. 2221, was reported favorably by the Senate Committee on the Judiciary (S. Rept. No. 1196, 77th Cong., 2d sess.), and passed the Senate. 88 Cong. Rec. 3174. The House Committee on the Judiciary, to which the measure was then referred, which had been holding hearings on H. R. 6463, the companion measure to S. 2221, the bill passed by the Senate, reported the bill favorably (H. Rept. 2245, 77th Cong., 2d sess.), but it was never considered by the House. It was reintroduced in the 78th Congress (H. R. 1356, 78th Cong., 1st sess.; S. 1114, 78th Cong., 1st sess.), but no action was taken and again in the 79th Congress (H. R. 181, reported in H. Rept. 1287, 79th Cong., 1st sess.). It was finally passed by the 79th Congress as part of the omnibus Legislative Reorganization Act; 60 Stat. 842.

[19] It may perhaps be suggested that the existence of a specific exception for claims arising in the Canal Zone (Section 421(g)) in addition to that for claims arising in a foreign country indicates that the Canal Zone was not considered a foreign country and is therefore some evidence that the defense bases are also not foreign countries within the meaning of the Act. The legislative history of the exception made for the Canal Zone precludes attaching any such construction. It was inserted long before the exception for claims arising abroad and was perpetuated for entirely separate reasons. In view of the conflict of opinion as to the status of the Canal Zone (see footnote 6, p. 19 of Government brief in *Vermilya-Brown Co. v. Connell*, No. 22, October Term, 1948, 335 U. S. 377) reliance on the general exception of claims arising in foreign countries to bar claims arising in the Canal Zone might well have proved misplaced. An exception for "Any claim against the Panama Canal arising from injury to vessels or cargo while passing through the locks of the Panama Canal or while in Canal Zone waters" was first placed in the draft of the bill

It is, of course, clear that respondent's cause of action rests upon foreign law; the complaint relies explicitly upon the laws of Newfoundland (R. 2).[20] Thus, therefore, is the very type of case

introduced as H. R. 17168 during the 3rd session of the 71st Congress. All subsequent drafts contained this exception, including H. R. 7236 introduced during the 76th Congress which was the first bill to contain the exception for "any claim arising in a foreign country in behalf of an alien." In the course of the hearings on H. R. 7236 before Subcommittee No. 1 of the House Committee on the Judiciary, Bernard F. Birdsall, Legal Advisor to the Panama Canal Zone, requested that the language be amended to conform to the Canal Zone Code by broadening the exception to exclude any claims arising from injury to the crew or passengers, as well as to the cargo of vessels. (pp. 26, 27). H. R. 7236, as reported by the Committee, contained the exception, changed as requested, with the explanation that claims arising in Canal Zone waters had been excepted "as provision is made for them by the Canal Zone Code" (H. Rept. 2428, 76th Cong., 3rd sess., p. 5). This language appeared in every subsequent draft of the bill until its enactment. It was not until the 2d session of the following Congress that the exception for claims arising in a foreign country was broadened by eliminating the phrase "in behalf of an alien." (S. 2221 and H. R. 6463, 77th Cong., 2d sess.) It is not apparent that any consideration was given the effect of this change on the exception carried over from the previous bills of claims arising in the Canal Zone. Since careful draftsmanship alone would have dictated the retention of the specific exception for claims arising in that Zone, even after the broad exclusion from the Act of claims arising in a foreign country, in view of the anomalous status of the Panama Canal Zone under current Court decisions (cf. *Wilson* v. *Shaw*, 204 U. S. 24, 33 with *Luckenbach S. S. Co.* v. *United States*, 280 U. S. 173, 177), no significance should be attached to it.

[20] There can be no question of the applicability of the laws of Newfoundland to the Harmon Base. Specific provision is made in the leasehold terms to secure limited exemptions for the base personnel from certain aspects of that law, as for example the tax (Article XVII), immigration (Article XIII) and customs (Article XIV) laws. Other provisions similarly evidence the acceptance by both contracting parties of the dominion of the territorial laws over the leased areas, such as that securing a right of audience for [illegible] the territorial courts whenever a member of the United States forces is made a party to a legal proceeding because of his official acts (Article VII), that providing for service of local

the exception for claims arising in foreign countries was designed to reach.

Before leaving this phase of the legislative history it might be desirable to advert to one point made by the court below the clarification of which rests in large measure on the history of the Act. In the fact that the district courts given jurisdiction under the Act, as passed by the 79th Congress, are specified as those for the "Territories and possessions" the court below found support for its position that the Federal Tort Claims Act, like the Fair Labor Standards Act, extends to the leased areas. 171 F. 2d at 209. However, as the legislative history shows, the word "possessions" was used in the Act, not to describe its coverage, but only to identify the courts in which action might be brought.

In the earliest draft of the Tort Claims bill giving a right to suit in the courts, jurisdiction was conferred "on the Court of Claims and the district courts." H. R. 7236 and S. 2690, 76th Cong., 1st sess. When H. R. 7236 was before the House for consideration, Mr. King inquired as to whether "district courts" embraced the District Court of Hawaii (86 Cong. Rec. 12021), and the bill was amended in include that court specifically (86 Cong. Rec. 12028). In the revision of the act made by

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process (Article VI), and that waiving the motor vehicle tax on vehicles belonging to the United States (Article XII) Executive Agreement Series 235, Leased Naval and Air Bases (GPO, 1942).

the Department of Justice during the course of the 77th Congress tort jurisdiction was given not only to the district court for Hawaii but to those for the other Territories and possessions as well. Other than the statement that it had been made, no explanation was given of this change (Hearings, pp. 27, 31, 43, 61), and it is unlikely that either the Department of Justice or Congress thought that it in any way impinged upon the exception made simultaneously of all claims based on foreign law.[21]

That the only function of the word "possession" in the Act is to identify the courts in which suit may be brought, and that even there it was intended most narrowly, appeared most clearly during the revision of the Judicial Code by the 80th Congress in 1948. In place of the blanket reference to the courts of the "Territories and Possessions", the Senate Committee on the Judiciary substituted language specifically designating those courts given

[21] In the Defense Base Act (55 Stat. 622, 42 U. S. C. 1651), enacted contemporaneously, in which it was intended to give district courts of the United States jurisdiction over acts committed on the defense bases, the jurisdictional language employed was very different from that used in the Federal Tort Claims Act which was intended to apply only territorially. Whereas the Federal Tort Claims Act gives jurisdiction to the "United States district court for the district wherein the plaintiff is resident or *wherein the act or omission complained of occurred*," (emphasis added) the Defense Base Act provides that judicial proceedings "shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the *judicial district wherein the injury occurred*." (Emphasis added.)

jurisdiction under the Act. These are the courts for Hawaii and Puerto Rico, which are not specifically named since they are included in the term "district courts" as used throughout the Code (28 U.S.C. 91, 119, 132), and those for Alaska, the Canal Zone and the Virgin Islands. 28 U.S.C. 1346(b). The change was explained as follows (S. Rept. 1559, 80th Cong., 2d sess. (p. 6):

> * * * in at least one of the possessions there are local district courts which are not intended to have tort-claims jurisdiction but which would be included by the general terms of the language which the amendment strikes out. The specific inclusion of the courts of the three remaining Territories and possessions thus makes for clarity and precision.

It is significant that the Senate Committee on the Judiciary, which had been the responsible committee in the Senate during the development of this phase of the Act in the 76th and 77th Congresses,[22]

[22] The Senate Committee on the Judiciary had been charged with the consideration of the earliest version of the bill drafted by the Department of Justice conferring jurisdiction only on the "Court of Claims and the district courts" (S. 2690, 76th Cong., 1st sess., 84 Cong. Rec. 7834), with the measure as revised in the House, to include "the United States District Court for Hawaii" (H.R. 7236, 76th Cong., 1st sess., 86 Cong. Rec. 12065) and with the final version in which all the "district courts for the Territories and possessions" were included. (S. 2221, 77th Cong., 2d sess., 88 Cong. Rec. 586). It reported the latter favorably (S. Rept. 1196, 77th Cong., 2d sess.). Although in the 79th Congress it was replaced by a Special Committee on the Organization of Congress, the Federal Tort Claims Act being made a part of a general reorganization act, s. 2177 (S. Rept. 1400, 79th Cong., 2d sess., p. 29), there

did not consider these changes other than as clarifying the statute. The intention not to include even all the recognized possessions within the broad designation of the "district courts of the Territories and possessions," clearly demonstrates that there could have been no intention to embrace areas held only under lease.

C. WHEN CONGRESS DRAFTED AND PASSED THE ACT, IT WAS AWARE OF THE ANOMALOUS CHARACTER OF THE DEFENSE BASES AND CHOSE LANGUAGE TO EXCLUDE CLAIMS ARISING ON THEM FROM ITS COVERAGE.

When the language of the exception carving out claims arising in foreign countries from the coverage of the Act crystallized during the 77th Congress, and passed the 79th Congress, we were already in possession of the defense bases and Congress was already cognizant of the problems raised by them.[23] When Congress intended particular legislation passed during this period to embrace the defense base areas it used language calculated

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can be no doubt, in view of the role played by it in the 77th Congress when the bill crystallized, of its responsibility for the present language. See footnote 2, *supra*.

[23] The Judiciary Committee of the House, which took a leading role in the development of the legislation, was peculiarly cognizant of the problems raised in the field of tort liability by the dual jurisdiction of two sovereignties over the local areas. This was precisely the problem to which it had directed its attention in the hearings it had held on the Defense Base Act. See unpublished hearings before the House Judiciary Committee on H.R. 5096, 77th Cong., 1st sess. The change in the language of the Federal Tort Claims Act to exclude all claims arising in a foreign country whether in behalf of an alien or citizen was made with the approval of the Committee in the session following these hearings.

to that end. The Defense Base Act, passed during the 1st session of the 77th Congress and amended the following session, specifically applies to "*any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government*", 55 Stat. 622, amended, 56 Stat. 1035; 42 U. S. C. 1651. The War Damage Act, passed by the 2nd session of the 77th Congress, applies to "such property situated in the United States (including the several States and the District of Columbia), the Philippine Islands, the Canal Zone, the Territories and possessions of the United States, *and in such other places as may be determined by the President to be under the dominion and control of the United States*"[24] (italics added), 56 Stat. 174, 176, 15 U.S.C. 606b-2. The Foreign Claims Act, passed by the 1st session of the 77th Congress and amended during the 78th Congress, applies to a "foreign country, *including places located therein which are under the temporary or permanent jurisdiction of the United States.*" (Italics added.) 55 Stat. 880, amended, 57 Stat. 66, 31 U. S. C. 224d. Congress could have used

[24] A member of the House Committee on Banking and Currency, to which the legislation had been referred in response to a question as to what was contemplated by the "additional coverage" of the clause, "in such other places • • •" as it appeared in the bill as reported by the Committee, stated without correction (88 Cong. Rec. 1851):

> As I recall—and I can be corrected by my colleagues if I do not state it correctly—that referred to Navy bases and Army bases under the control and jurisdiction of the United States wherein there may be private property connected with them.

similar language in the Tort Claims Act if it meant that statute to be applicable to the bases.

In the Federal Tort Claims Act, however Congress had no reason to treat the defense bases differently from any other territory located abroad, since the reason for excluding claims arising in foreign countries—the unwillingness of Congress to have the liability of the United States determined by the local law of a foreign sovereignty applied with the same force to these areas as to any other foreign territory. Congress therefore deliberately excepted, without qualification, "any claim arising in a foreign country" so as to exclude all claims, including those arising on defense bases, dependent upon foreign law. Cf. *United States* v. *Powell*, 330 U. S. 238, 244-245.

D. IN LEGISLATION CONTEMPORANEOUS WITH THE ACT CONGRESS INDICATED ITS UNWILLINGNESS TO HAVE CLAIMS ARISING ON THE DEFENSE BASES DETERMINED BY LOCAL LAW.

The conclusion suggested by the legislative history of the Tort Claims Act that Congress did not wish to subject itself to liability based upon foreign law, regardless of where the claim arose, is further supported by the fact that, in connection with two of the acts just referred to the Foreign Claims Act (55 Stat. 880, as amended, 57 Stat. 66; 31 U. S. C. 224d) and the Defense Base Act (55 Stat. 622, as amended, 56 Stat. 1035; 42 U. S. C. 1651), considered contemporaneously and by their

terms applicable to the defense base areas, Congress affirmatively indicated that it did not wish claims analogous to those falling within the Tort Claims Act arising in foreign territory to be governed by local law. Sutherland, *Statutory Construction*, 3rd Ed., Vol. 3, Secs. 6101-6105, pp. 156-163. Cf. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 389.

The Foreign Claims Act, passed by the 77th Congress "for the purpose of promoting and maintaining friendly relations by the prompt settlement of meritorious claims," authorized the administrative settlement of claims on account of damages caused by the armed forces "in a foreign country or possession thereof, including places located therein which are under the temporary or permanent jurisdiction of the United States, to the property, public or private, or the persons of inhabitants of such foreign countries, where the amount of such claim does not exceed $1,000." 55 Stat. 880. In amending the Act a year later to raise the maximum allowable to $5,000 (57 Stat. 66) Congress, at the request of the War Department, specifically repealed an earlier act passed during the first World War authorizing payment of claims of inhabitants of European countries only where the claims "would be payable according to the law or practice governing the military forces of the country in which they occur." Act of April 18, 1918, 40 Stat. 532. The memorandum submitted by the War Department to the Committee on Claims for the House requesting repeal of the 1918

act stated, "It seems preferable that we be free to adopt our own regulations governing the payment of such claims." H. Rept. 312, 78th Cong., 1st sess.; S. Rept. 145, 78th Cong., 1st sess. By acceding to the request of the War Department, Congress inferentially authorized and approved the practice of the War Department of adopting its "own regulations governing the payment" of claims cognizable under the Foreign Claims Act, including those arising in the defense base areas.*

Just as Congress rejected local law as the criterion for the settlement of claims against itself arising in foreign countries, so equally did it indicate its intention to supplant local law within the defense bases by its own in the field of tort claims against private citizens based upon the master-servant relationship. Almost immediately upon our occupation of these bases, the War Department, because of the uncertainty created by the varieties of local law at these bases, requested Congress to enact legislation extending the Longshoremen's and Harbor Worker's Compensation Act to the leased areas so as to give all private employees on the bases the same protection as that enjoyed by employees in the United States regardless of the vagaries of local law. S. Rept. 540, 77th Cong., 1st sess.; H. Rept. 1070, 77th Cong., 1st sess. Despite the doubts expressed during the course of hearings by the House Judiciary Committee as

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* See Army Regulations 25-90.

to the power of Congress to supersede local law and remedies in the defense base areas (Unpublished hearings before the House Judiciary Committee on H. R. 5096, Thurs., July 24, 1941, pp. 8-9, 27), the language of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 1426, 33 U. S. C. 905), making the remedy provided by that act exclusive, was not changed when it was extended to the leased areas. 55 Stat. 622. And a year later, when the Defense Base Act was amended, the liability of any employer under it was specifically made exclusive of "all other liability * * * under the workmen's compensation law of any State, Territory or other jurisdiction." 56 Stat. 1035, 1036, 42 U. S. C. 1651.

Clearly, in construing the Federal Tort Claims Act an intention should not be imputed to Congress to permit suit against the Government based on the local law at these defense bases when the lawmakers not only specifically rejected foreign law as the basis for the administrative settlement of tort claims, but even endeavored to take out from under such law claims against private persons.

It is, of course, true that the broad purposes of the Tort Claims Act were to allow persons injured by the negligence of Government officials and employees an adequate judicial remedy, and thereby to relieve Congress of the burden of considering many private bills. But these general purposes, which might otherwise be applicable to the situation presented in this case, cannot be controlling

when Congress has clearly expressed its intention as to the specific problem.

It is to be noted that the Legislative Reorganization Act of 1946, of which the Federal Tort Claims Act is a part, did not prohibit all private bills for tort claims, but only those "for which suit may be instituted under the Federal Tort Claims Act."[25] 60 Stat. 831. Because claims arising in foreign countries are not cognizable under the Federal Tort Claims Act, the 80th Congress has passed private bills to compensate one claimant for personal injuries suffered in Newfoundland (Private Law 418, 80th Cong., 2d sess.; S. Rept. 1666 and H. Rept. 1743, 80th Cong., 2d sess.) and another for personal injuries and the death of his wife as a consequence of an accident in Belgium (Private Law 359, 80th Cong., 2d sess., S. Rep. 1346 and H. Rep. 2082, 80th Cong., 2d sess.). Similar measures have been introduced into the 81st Congress. H. R. 1470,

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[25] The "Legislative Reorganization Act of 1946" as originally introduced by Mr. La Follette banned all private bills authorizing "the payment of money for property damages, for personal injuries or death" (Sec. 121(a) of S. 2177, 79th Cong., 2d sess.). After being reported favorably in this form by the Special Committee on the Organization of Congress (S. Rept. 1400, 79th Cong., 2d sess.), it passed the Senate (92 Cong. Rec. 6578). In the draft of the Act prepared by the House Committee on the Organization of Congress and offered and considered as a committee substitute for S. 2177 (92 Cong. Rec. 10056) the language was changed so as to bar only private bills authorizing "payment of money for personal injuries or death for which suit may be instituted under the Federal Tort Claims Act" (Sec. 131 of Committee bill, 92 Cong. Rec. 10071). The bill passed the House in this form (92 Cong. Rec. 10104) and the Senate concurred in the House amendment. 92 Cong. Rec. 10139-10152.

reported favorably in H. Rept. 524, 81st Cong., 1st sess. (Pozzuoli, Italy); S. 471, reported favorably in S. Rept. 449, 81st Cong., 1st sess. (Saipan); H. R. 3618, reported favorably in H. Rept. 882, 81st Cong., 1st sess. (Giessen, Germany).

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision below should be reversed.

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AUGUST 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE 1949 [illegible] 48

IN THE

Supreme Court of the United States

OCTOBER TERM— 1949

No. 42

42

UNITED STATES OF AMERICA,

Petitioner,

—against—

LILLIAN SPELAR, as Administratrix of the Estate of Mark Spelar, deceased,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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April 5, 1949

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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 633

UNITED STATES OF AMERICA,

Petitioner,

—against—

LILLIAN SPELAR, as Administratrix of the Estate of Mark Spelar, deceased,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The United States District Judge for the Eastern District of New York dismissed the complaint with an opinion reported at 75 F. Supp. 967. The Court of Appeals unanimously reversed the order of dismissal, with an opinion reported at 171 F. (2d) 708.

Jurisdiction

The Petitioner seeks to invoke the jurisdiction of this Court by applying for a writ of certiorari pursuant to 28 U. S. C. A. 1254(1).

Question Presented

Whether that portion of Newfoundland, possession of which was ceded to the United States pursuant to the Executive Agreement and 99 year lease entered into between the British Government and the United States of America on March 27, 1941 (55 Stat. pt. 2, 1560-1594) is a foreign country within the statutory intendment of Section 943, subdivision (k) of the Federal Tort Claims Act (now 28 U. S. C. A. 2680(k)), which excludes any claim arising in a foreign country.

Statutes Involved

The statutes involved are the Federal Tort Claims Act and the Executive Agreement and 99 year lease between the United States and Great Britain.

The Tort Claims Act has now been restated and included in the Judicial Code. However, one of the sections of the Tort Claims Acts having some significance in connection with the problem of construing legislative intent was revised after the commencement of the action below, and it is concededly the language of the original Tort Claims Act which Petitioner seeks to have construed.

The pertinent portion of the original Tort Claims Act (60 Stat. 843, 28 U. S. C. 931) provided:

> "Subject to the provisions of this chapter, the United States District Court for the district wherein the plaintiff is resident, or wherein the act or omission complained of occurred, including the United States District Courts for the territories *and possessions of the United States*, * * * shall have exclusive jurisdiction * * * on any claim against the United States, for

> money only on account of * * * personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his * * * employment, under circumstances where the United States if a private person would be liable to the claimant for such * * * death in accordance with the law of the place where the act or omission occurred." (Italics and deletions ours.)

In the revised Judicial Code, instead of authorizing jurisdiction in the United States District Courts for all the territories and possessions of the United States, jurisdiction of courts outside the states is confined to the District Court for Alaska, the Canal Zone and the Virgin Islands. However, at the time of the commencement of the action (April 24, 1947) the Act conferred jurisdiction on United States District Courts in all of the territories and possessions of the United States.

Section 943, subdivision (k) (unchanged in the revision and now 28 U. S. C. A. 2680-k) provides:

> "The provisions of this chapter shall not apply to any claim arising in a foreign country."

While the Court has previously considered the terms of the Executive Agreement and 99 year lease involved herein in connection with *Vermilya Brown Co. v. Connell*, 335 U. S. 377, there will be made available to the Court a copy of the Agreement, together with the notes that were exchanged in connection therewith, as they appear in Document No. 158 of the House of Representatives, 77th Congress. Emphasis by underlining have been supplied to those portions of the Executive Agreement believed to be of special significance in consideration of the question presented.

Statement

The Respondent is the widow of a deceased employee of American Overseas Airlines, residing in the Eastern District of New York and duly appointed Administratrix of her husband's estate by the Surrogate's Court in Queens County, in the Eastern District of New York.

She commenced her action to recover damages for the wrongful death of her husband, pursuant to the Federal Tort Claims Act, in April of 1947, in the District Court of the United States for the Eastern District of New York, alleging that her husband received fatal injuries at or near Harmon Field, Stephenville, Newfoundland, on October 3, 1946, as a result of the defendant's negligence.

Harmon Field is one of the areas covered by the Executive Agreement and 99 year lease of March 27, 1941 (55 Stat. pt. 2, 1560-1594, House Document #158, 77th Congress, 1st Session). The Government moved to dismiss the action upon the ground that the Court lacked jurisdiction, since the claim arose in a foreign country (ff. 23, 24). In granting this motion, the District Judge predicated his opinion on the application of "the familiar principle that a Congressional waiver of sovereign immunity is to be narrowly construed. And under any narrow construction of the statute the expression 'foreign country' certainly applies to Newfoundland and even to areas within it over which the United States exercises many, but not all of the powers of a sovereign" (ff. 39, 40).

The Court of Appeals unanimously reversed on December 8, 1948, which was just two days after the announcement of the opinion of this Court in *Vermilya-Brown Co.* v. *Connell*, rejecting the doctrine of a "niggardly" construction to the provisions of the Tort Claims Act, and pointing out moreover that the statutory exception re-

ferring to a "foreign country" is sufficiently precise and explicit, so that even without the *Connell* precedent the widow's claim must be held included in the coverage of the Act.

Argument

On March 27, 1941, the possession and control of the air base and surrounding territory involved here was ceded to the United States by virtue of an Executive Agreement implemented by a 99 year lease. This was the same Executive Agreement analyzed in detail by the Court of Appeals in the Second Circuit in *Connell et al.* v. *Vermilyea Brown Co.*, 164 F. (2d) 924, and by this Court in *Vermilyea Brown Co.* v. *Connell*, 335 U. S. 377, and another detailed analysis would be superfluous here.[1] The complaint of the Respondent lay properly unless the area so demised remained a foreign country.[2] The grant to the United States carried with it, however, not only possession for 99 years, but so many broad grants of powers, including legislative and judicial jurisdiction, that it would seem to clearly foreclose a judicial determination that the leased areas remained a foreign country. While a foreign country is generally thought to be one with the status of an international person, with the rights and responsibilities under international law of a member of the family of nations, the minimal requirement appears to be that it be *exclusively* within the sovereignty of a foreign nation.

1 See Agreement as filed with clerk in which significant grants of sovereign powers to the United States have been underlined.

2 28 U. S. C. 2680(k).

3 *De Lima* v. *Bidwell*, 182 U. S. 1, 180.

The only argument made by the Government for granting review here, in spite of what would appear to be the conclusive authority of *Vermilya Brown Co. v. Connell*, 335 U. S. 377, is that the intent of Congress in using the term "foreign country" is still open to judicial exploration, and that this Court should undertake a long and exhausting safari into the deep jungles of legislative history, where the Court is assured will be found evidence of an intent not to make tort controversies with the United States justiciable under the laws of a foreign country. It should be perfectly clear that the expedition would be abortive and the trophy mere fool's gold; even granting the motivation of Congress to be a caution not to make the Government of the United States subject to the processes of a foreign country, it is perfectly clear that in the case of the leased areas of Newfoundland the Government of the United States has the *power* to enact its own legislation and set up its own judicial processes. So far as this statute is concerned, and granting the legislative purpose which the government argues, Harmon Field is indistinguishable from any other possession of the United States.

Article I, of the Executive Agreement, gives the United States all rights, powers and authority appropriate for the use and control of the area.[4] This power to legislate for the leased areas has already been exercised in the case of the Longshoremen's & Harborworkers' Compensation Act,[5] and Congressional reports recognize that civil courts have not

[4] And see the last portion of Article III, which makes it clear that these powers include authority to legislate unilaterally and establish courts without consulting the United Kingdom.

[5] *Defense Base Act*, 56 Stat. 1028, 42 U. S. C. 1651 (1942).

been established only because of practical difficulties and the judicial system of courts martial has therefore been made applicable.

It is therefore absolutely consistent with a Congressional intent to insulate petitioner's liabilities under the Tort Claims Act from the force and effect of the laws of a foreign country to acknowledge the perfectly obvious fact that the "leased areas" are not foreign countries. The petitioner can enact its own death statute for the leased area, or declare the Newfoundland statute repealed in the leased area; not having done so it is clear as a matter of construction that Congress has approved the Newfoundland Death Statute as fair and reasonable. The Newfoundland

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6 The report of the Senate Committee on Naval Affairs (Senate Report #26, January 28, 1943, U. S. Code Congressional Service, pp. 2 to 8) recommended favorable consideration of a bill which extended Naval courts martial to certain persons in leased areas outside the continental limits of the United States. This bill became law on March 22, 1943 (34 U. S. C. A. 1201). The report pointed out that a similar law had already been passed for civilians accompanying the armed forces without the territorial jurisdiction of the United States (Article 2(d) of the Articles of War, 41 Stat. 787, 10 U. S. C. 1473 (d)).

The report points out (page 8):

> "The President has stated that civil courts will not be established in leased areas beyond the territorial jurisdiction of the United States.
>
> There are many practical difficulties connected with the administration of justice in the outlying islands through the civil courts when such islands are occupied in time of war or national emergency almost solely by the armed forces and persons accompanying or serving them.
>
> It is highly desirable to provide during such time for the administration of justice in these areas in the cases of civilians offending against naval laws, and also to have civilians employed in adjacent areas by the Army and Navy, respectively, or by their contractors amenable to similar laws, jurisdiction and courts.

7 In any event, local private law continues until altered by the successor legislative authority. *United States v. O'Donnell*, 303 U. S. 501 (1938); *Shapleigh v. Mier*, 299 U. S. 468 (1936) and the petitioner does not dispute that the Newfoundland Death Statute governs although it reaches this conclusion by a process of interpretation with [illegible]

Death Statute (ff. 15, 16) is identical with the death statute in many states.[5]

Those reasons of high international and critical domestic policy which may have prevailed on four justices of this Court to dissent in *Vermilya Brown v. Connell, supra*, are not present here. On the contrary, there is no rational basis for distinguishing between the remedy that should be available had the Respondent's husband been killed at an airfield in Guam, which became a territory of the United States by treaty, and the Newfoundland base which came into our possession by agreement and lease. The lessor's reversionary interest after 99 years and the restrictions imposed on colonization and commercialization of the ceded area during the term of the lease are obviously irrelevant.

Another complication of *Vermilya Brown* not present here is that the Fair Labor Standards Act was passed prior to the acquisition of the bases. The Tort Claims Act, using the exception of "foreign countries" was enacted in 1946, which even followed the extension of the Longshoremen's & Harborworkers' Compensation Act to these bases.

If the Petitioner validly anticipates "a large potential liability" in these leased areas (the occupants of which are largely military and civilian employees of the Petitioner having other exclusive statutory remedies for deaths and personal injuries) then the remedy should be legislative. The language and purpose of the present statute is too clear and explicit for judicial reformation. There are no authoritative decisions in other circuits to the contrary.

[5] As a practical matter, the petitioner must accept whatever death statute is passed by the states, but it can write its own ticket in this alleged "foreign country."

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: April 5, 1949.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1949.

No. 42

UNITED STATES OF AMERICA,

Petitioner,

—against—

LILLIAN SPELAR, as Administratrix of the Estate of MARK SPELAR, Deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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September 12, 1949

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IN THE

Supreme Court of the United States

OCTOBER TERM—1949

No. 42

UNITED STATES OF AMERICA,

Petitioner,

—against—

LILLIAN SPELAR, as Administratrix of the Estate of MARK SPELAR, Deceased,

Respondent.

BRIEF FOR THE RESPONDENT

Opinions Below

The United States District Court for the Eastern District of New York dismissed the complaint with an opinion (R. 10-15) reported at 75 F. Supp. 967.

The United States Court of Appeals for the Second Circuit unanimously reversed the order of dismissal and the opinion (R. 19-24) is reported at 171 F. (2d) 208.

Jurisdiction

The petition for a writ of certiorari was filed by the Petitioner on March 8, 1949, pursuant to 28 U. S. C. A. 1254 (1), addressed to the judgment of the Court of Appeals entered on December 8, 1948 (R. 25). Certiorari was granted on April 18, 1949, 336 U. S. 950.

Question Presented

"Does the exclusion from the coverage of the Federal Tort Claims Act of 'any claim arising in a foreign country,' 28 [U. S. C. A., Section 943(k), revised Title 28, United States Code, Section 2680(k), prevent recovery from the United States of America for wrongful death occurring on a Government airfield in Newfoundland in an area covered by a 99 year lease and Executive Agreement as a part of the famous 'destroyer deal' between Great Britain and the United States of March 27, 1941?" [1]

Statutes Involved

The pertinent portion of the Federal Tort Claims Act, 60 Stat. 842, 843, 28 U. S. C. 931 *et seq.* (1946), provided at the time this action was commenced:

> "Subject to the provisions of this chapter, the United States District Court for the district wherein the plaintiff is resident, or wherein the act or omission complained of occurred, including the United States District Courts for the Territories *and possessions of the United States*, • • • shall have exclusive jurisdiction • • • on any claim against the United States, for money only on account of • • • personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his • • • employment, under circumstances where the United States if a private person would be liable to the claimant for such • • • death in accordance

[1] Opinion of Court of Appeals, 171 F. 2d 208

with the law of the place where the act or omission occurred.[2]

• • • The provisions • • • shall not apply to • • • (k) any claim arising in a foreign country." (Italics and deletions ours.)[3]

Statement

On October 3, 1946 a plane of the American Overseas Airlines, on a flight from LaGuardia Field in New York to Shannon, Ireland, crashed on a take-off from Harmon Field killing all of the crew and passengers on board. Harmon Field and the surrounding area in Stephenville, Newfoundland was and is possessed by the United States under an Executive Agreement and 99 year lease. An immediate investigation of the accident was conducted at the scene by the Civil Aeronautics Board[4] in accordance with Title 7 of the Civil Aeronautics Act of 1938 as amended.[5]

The Civil Aeronautics Board thereafter held a regular hearing in New York City on October 11, 1946, presided over by one of their officers, and which was attended by the Chief Inspector of Accidents, Royal Canadian Air Force, official representative of the Newfoundland Government, and by a member of the Civil Aeronautics Department of

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2 Since the commencement of this action the Tort Claims Act has been revised and amended as part of the 1948 Revision of the Judicial Code, and the pertinent sections of the Act in the Revision are as follows: jurisdiction of the courts is now 28 U. S. C. 1346(b); venue for Tort Claim actions is now 28 U. S. C. 1402(b); Tort Claims procedure generally is 28 U. S. C. 2671 to 2680 inclusive, and the exceptions to the coverage of the provisions of the Tort Claims Act are found in 28 U. S. C. 2680.

3 There has been no change in the Revision with respect to exception (k) which excludes "any claim arising in a foreign country."

4 Civil Aeronautics Board File [illegible]-46 Docket No. SA-125

5 49 U. S. C. 581, 582

the Government of Newfoundland as an observer. At this hearing some 17 witnesses gave testimony under oath and some 34 exhibits were received in evidence.

Lillian Spelar, the Respondent, is the Administratrix of the Estate of Mark Spelar, the Flight Engineer of the crashed plane. She was granted Letters of Administration by the Surrogate's Court of Queens County, New York, where she and the decedent resided (R. 5, 6).

In April of 1947 the Respondent commenced an action in the Eastern District of New York pursuant to the Federal Tort Claims Act, alleging that the death of her husband was caused by the negligence of the Government in the supervision and maintenance of Harmon Field (R. 4, 5). The Petitioner raised the question of whether the area where the accident occurred was a foreign country by a motion to dismiss, upon the ground that the claim arose in a foreign country (R. 8).

The District Court granted the motion on the ground that the Federal Tort Claims Act gave no clear and specific clue concerning the geographical area to which Congress intended the legislation to be applicable, and that therefore there was no recourse except to apply the familiar principle that a Congressional waiver of sovereign immunity is to be narrowly construed, and that under any narrow construction of the statute the expression "foreign country" certainly applies to Newfoundland, and even to areas within it over which the United States exercises many, but not all, of the powers of a sovereign (R. 13, 14).

The Court of Appeals unanimously reversed on December 8, 1948, which was just two days after the announcement of the opinion of this Court in *Dalehite Brown & Co.* v.

Council, 335 U. S. 377, rejecting the doctrine of "niggardly construction" to the provisions of the Tort Claims Act and pointing out moreover that the statutory exception referring to a "foreign country" is sufficiently precise and explicit so that even without the *Council* precedent the widow's claim must be held included in the coverage of the Act (R. 22, 23).

Summary of Respondent's Argument

There is no longer any room in our present conception of public morality regarding Governmental responsibility to persons damaged by the Government's torts, for the doctrine that a waiver of the sovereign immunity to suit must be strictly construed.

The Executive Agreement and 99 year lease between the United States and Great Britain of March 27, 1941 (55 Stat. Part 2, 1560-1594, House Document #158, 77th Congress) conferred territorial possession and control over the area where this tort was committed, including legislative and jurisprudential dominion. The presumption of territoriality resorted to by this Court in *Foley Brothers* v. *Filardo*, 336 U. S. 281, 285, has no application here because the Tort Claims Act prescribes its geographical coverage with sufficient precision to bar reliance on a canon.

The leased area in Newfoundland could never be judicially construed to be a "foreign country" without doing violence to the long accepted understanding of the term, to wit: that a foreign country is one exclusively subject to the sovereignty of a foreign nation.

There is no anomaly in the Respondent's resort to the death statute of Newfoundland. There is no discernible legislative purpose to exclude all tort claims based on foreign law and, even if there were, the Death Statute upon which

the Respondent relies is by construction that adopted by Congress for the leased areas.

Governmental agencies have, with considerable uniformity, considered the leased areas to be subject to the legislative, administrative and judicial control of the United States and the Petitioner cannot now be heard to assert that they are foreign countries. There are no reasons of policy to justify a deviation from the Congressional expression of intended generosity toward tort claimants.

The Petitioner seeks a construction of legislative intent whereby given areas, possessions of the United States for the purpose of measuring the responsibility of private individuals, are nevertheless foreign countries where its responsibilities as a sovereign are involved. Such a mean and anomalous intention should not be attributed to Congress without compelling reasons of policy to rationalize the distinction.

ARGUMENT

POINT I

The Federal Tort Claims Act is remedial in nature and should not be stultifyingly construed.

If canons of constructions need be resorted to to determine whether or not Congress intended to exclude claims arising in the leased areas from the coverage of the Tort Claims Act when it used the term "claims arising in a foreign country," then immediate disposition must be made of that outworn, anachronistic and archaic hoodwink that a waiver of sovereign immunity from suit is to be strictly construed. The purpose of the Tort Claims Act was explained to the Judiciary Committee of the House of Representatives by Francis M. Shea, Assistant Attorney General in charge of

the Claims Division, at the 77th Congress, 2nd Session, when hearings were being conducted on certain proposed changes.

Mr. Shea explained (page 29) that the bill was a necessary step in the gradual disappearance of the sovereign's archaic immunity from responsibility for its agents' conduct. He said that in an era of steadily growing Government activity the absence of a satisfactory procedure for redressing wrongs is a great defect in our social policy and that the bill would supply a well-defined, continually operating machinery to redress tortious wrongs arising out of Government activity in place of existing procedures which are admittedly inadequate and burdensome to the Government and the claimant. He quoted with approval the words of President Lincoln to the effect that it is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals.

The remedial purposes of the Tort Claims Act is scarcely open to question and, in fact, this Court very recently in *Larson, as War Assets Administrator, etc.* v. *Domestic and Foreign Commerce Corporation*, 338 U. S. (1949), promised to give hospitable scope to the trend of Congress to permit such suits to be maintained against the sovereign.*

It is now generally recognized that the Federal Tort Claims Act has restored to the individual citizen that equality as a litigant with respect to some private rights with his Government which should have been an integral part of our conception of public morality regarding Governmental responsibility at the time of our Government's origin.

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2. Hearings before the Committee on the Judiciary, House of Representatives, 77th Congress, 2d Session, on H. R. 5373 and H. R. 6463.

* See *Keifer & Keifer v. United States*, 306 U. S. 381 (1939).

Full scope should be given to the remedial purpose of the legislation, and in construing whether it was intended to include the leased bases in the coverage of the Act it should be borne in mind that the language selected to demarcate the area of its liability was that chosen by the tortfeasor. Were there any doubt created by the text chosen, that doubt should be resolved against the drafter and in favor of the injured party. We contend, however, that Congress intended that torts committed by the Petitioner in the leased bases should be suable under the Act.

The Court should not adopt the fiction that our leased possessions are foreign countries in order to deprive tort claimants of their day in court with their sovereign unless sound reasons of policy would dictate that result.

POINT II

Congress did not intend to exclude our leased possessions when it selected the term "foreign countries" as the geographical exclusion for the Tort Claims Act.

The place where this action arose was obtained from Great Britain under the identical Executive Agreement of March 27, 1941 (55 Stat. Part 2, 1560-1594) and 99 year lease as that considered by this Court in *Vermilyea Brown Co. v. Connell*, 335 U. S. 377, in which this Court concluded that these areas were possessions within the amendment of the Fair Labor Standards Act.[2]

The Executive Agreement of March 27, 1941 was already important history by 1946 when the Congress enacted the Federal Tort Claims Act and the provisions of the Executive Agreement may therefore be examined to determine whether they were such as to place Congress on notice that if it

[2] 29 U. S. C. A. 201 et seq.

selected the term "foreign countries" to mark the geographical exclusion of the coverage of the Act, it would not thereby exclude claims arising in the areas acquired by that famous transaction.

Article I (1) gave to the United States all the rights, power and authority within the leased area which are necessary for the establishment, use, operation, and defense thereof, or appropriate for their control * * *. In contradistinction with this broad general grant of power and authority which we argue includes legislative and jurisprudential control is the more limited grant with respect to territorial waters and adjacent air space.[10]

It is to be particularly observed that the covenant of the United States contained in Article I (3) and (4) of the Executive Agreement not to use the powers granted unreasonably, etc. and to consult with the government of the United Kingdom in the practical application of the rights granted is made only with respect to powers granted *outside* the leased areas. The rights, authority and power of the United States are supreme and unfettered *in* the leased areas except for several minor reservations of right in the Executive Agreement. It cannot be argued nor does petitioner suggest that any right reserved to Great Britain in the Executive Agreement could be construed to reserve ultimate legislative or jurisprudential control in the leased areas from the United States.

Many other of the important *indicia* of sovereignty were granted to the United States. So long as the United States continues to use the leased area it has exclusive jurisdiction

[10] Article I (1) in its entirety reads as follows:

"The United States shall have all the rights, powers and authority within the leased areas which are necessary for the establishment, use, operation and defense thereof, or appropriate for their control, and all the rights, power and authority within the limits of territorial waters and air spaces adjacent to, or in the vicinity of, the leased areas, which are necessary to provide access to and defense of the leased areas or appropriate for control thereof."

over public health, safety, law and order as well as defense.[11]

That the United States has the right under the Agreement to establish courts in the leased area is made crystal clear by a reference to such a court in Article IV (4) which provides that British subjects may be tried for certain offenses "by a United States court sitting in a leased area in the territory."[12]

By Article VI no arrest may be made and no process, civil or criminal, may be served within the leased area except with the permission of a representative of the United States, and process is defined by sub-division (3) of Article VI as including "any process by way of summons, subpoena, warrant, writ or other judicial document for securing the attendance of a witness, or for the production of any documents or exhibits, required in any proceedings, civil or criminal."

The separation of executive supremacy between the leased areas and the balance of the territory in which the leased area is located is emphasized by Article VIII, which provides for reciprocity in connection with a surrender of offenders.

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11 Article III states:

> "The United States shall be under no obligation to improve the leased areas or any part thereof for use as naval or air bases, or to exercise any right, power or authority granted in respect of the leased areas, or to maintain forces therein, or to provide for the defence thereof, but if and so long as any leased area, or any part thereof, is not used by the United States for the purposes in this agreement set forth, the Government of the United Kingdom or the Government of the Territory may take such steps therein as shall be agreed with the United States to be desirable for the maintenance of public health, safety, law and order and, if necessary, for defence." (Italics supplied.)

12 Compare this with the jurisdictional provision of the Tort Claims Act passed five years later conferring jurisdiction on courts "including the United States District Courts for the Territories and possessions of the United States." 28 U. S. C. (Supp. V) 1346.

The reservations of authority to Great Britain serve only to emphasize the broad extent and general character of the sovereign control granted to the United States by the Agreement. For example, it was necessary to provide in the Agreement that British commercial vessels may use the leased areas on the same terms and conditions as United States commercial vessels (Article XI (3)); and that the leased area is not a part of the territory of the United States for the purpose of coastwise shipping laws so as to exclude British vessels from trade between the United States and the leased areas (Article XI (4)), and that commercial aircraft will not be authorized to operate from any of the bases except under certain conditions (Article XI (5)).

By Article XIII the immigration laws of the territory are made inapplicable as a practical matter, and by Article XIV tariffs on trade with the leased areas are as a practical matter prohibited.

The United States has the right to establish its Post Office in the leased areas (Article XVI) and United States nationals are granted an exemption from the tax laws in the balance of the territory (Article XVII).

The most important restrictions imposed by the Agreement on the sovereignty of the United States over the leased area appear to be the restrictions of Article XVIII which prohibit the establishment of businesses and commercial and professional activity. These restrictions were of course, calculated to maintain the character of the leased areas as defense bases and would seem completely immaterial to resolving the question of whether Congress believed the leased areas to be foreign countries when it used that term in drafting the geographical limitations in coverage of the Federal Tort Claims Act.

Article XXIV makes it clear that the Executive Agreement and leases accomplished a transfer of possession to the United States.

Finally, however, there is this admission of the legislative supremacy of the United States in the leased area: "During the continuance of any lease no laws of the territory which would derogate from or prejudice any of the rights conferred on the United States by the lease or by this agreement shall be applicable within the leased area save with the concurrence of the United States."[11]

The Executive Agreement containing these important grants of power, authority and jurisdiction, was signed on March 27, 1941 and transmitted to the Congress by a note of the same date, was referred to the Committee of the Whole House on the State of the Union and was ordered to be printed.[12] The leases implementing the transfer of possession were signed and delivered.

The terms and conditions of the Executive Agreement received more than usual publicity and scrutiny both in the press and in legislative and political quarters because of the question of whether or not the transaction with the United Kingdom could be validly made without treaty and the ratification of the Senate. The United States did in fact, without delay, go into possession and occupancy of the leased areas and that fact of occupancy and possession was not and has not been challenged by anyone.

The cession of the leased area to the United States was a long established fact by 1946 when Congress passed the Tort Claims Act. It would seem very obvious that had Con-

[11] Article XXIX reads in its entirety as follows:

"The United States and the Government of the Territory respectively will do all in their power to assist each other in giving full effect to the provisions of this agreement according to its tenor and will take all appropriate steps to that end. During the continuance of any lease no laws of the territory which would derogate from or prejudice any of the rights conferred on the United States by the lease or by this agreement shall be applicable within the leased area save with the concurrence of the United States."

gress intended to exclude the defense base areas from the coverage of the Foot Claims Act it would have selected almost any term other than "foreign countries" to mark the geographical areas beyond which the Act was not to apply. In ordinary parlance, if not indeed as a matter of judicial interpretation, the term "foreign country" is thought of as meaning an area exclusively within the sovereignty of a foreign nation and without the sovereignty of the United States.[15] *Cf. De Lima* v. *Bidwell*, 182 U. S. 1, 180 and *Fourteen Diamond Rings* v. *U. S.*, 183 U. S. 176.

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15 In choosing the term "foreign country", the framers of the legislation must have intended to embrace exclusively under the sovereignty of a country other than the United States. This Court in tariff cases had made the same distinction on the basis of sovereignty. After the ratification of the peace treaty between the United States and Spain, Puerto Rico and the Philippines ceased to be "foreign countries" under the tariff laws. The Supreme Court so held in *De Lima* v. *Bidwell*, 182 U. S. 1 and *Fourteen Diamond Rings* v. *United States*, 183 U. S. 176. In the *De Lima* case the Court said (p. 180):

> "Whether these cargoes of sugar were subject to duty depends solely upon the question whether Porto Rico was a 'foreign country' at the time the sugars were shipped, since the tariff act of July 24, 1897, c. 11, 30 Stat. 151, commonly known as the Dingley act, declares that there shall be levied, collected and paid upon all articles imported from foreign countries certain duties thereon specified. A foreign country was defined by Mr. Chief Justice Marshall and Mr. Justice Story to be one exclusively within the sovereignty of the United States. The Boot Elize, 3 Cranch 4; Talbot v. United States, 1 Story, 1; The Ship Adventure, 1 Brock. 235, 241. The status of Porto Rico was this: The Island had been for some months under military occupation by the United States as a conquered country when, by the second article of the treaty of peace between the United States and Spain, signed December 10, 1898, and ratified April 11, 1899, Spain ceded to the United States the island of Porto Rico, which has ever since remained in our possession, and has been governed and administered by us. If the case required, many facts in these facts, and the question were [illegible] sovereignty which had been ceded to us [illegible] and the island occupied [illegible] by Spain or any other power, [illegible] it would seem that

The analogy of the situation in the *Fourteen Diamond Rings* case (*supra*) and the instant case is very strong, except that in the case of the Philippines acquisition was by instrument denominated as a treaty (even though the United States agreed to pay to Spain the sum of $20,000,000.00 therefor within three months) and in the case of the Newfoundland base acquisition was by an instrument identified as an Executive Agreement.

Quite aside from the political question of whether or not the United States has "sovereignty" over the leased area it is, as the Court of Appeals below thought, on the whole fantastic to believe that Congress considered the leased areas to be foreign countries within the meaning of a local

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fee simple to a purchaser, who had accepted the deed, gone into possession, paid taxes and made improvements without let or hindrance from his vendor. But it is earnestly insisted by the Government that it never could have been the intention of Congress to admit Porto Rico into a customs union with the United States, and that, while the island may be to a certain extent domestic territory, it still remains a 'foreign country' under the tariff laws, until Congress has embraced it within the general revenue system."

In the case of *Fourteen Diamond Rings v. United States* (*supra*), the court said, at page 178:

"The Philippines were not simply occupied but acquired, and having been granted and delivered to the United States by their former master were no longer under the sovereignty of any foreign nation."

The Government had sought, in the *Fourteen Diamond Rings* case, to distinguish it from the *De Lima* case by reason of the fact that after the treaty with Spain had been ratified Congress specifically resolved that "it is not intended to incorporate the inhabitants of the Philippine Islands into citizenship of the United States, nor is it intended to permanently annex said islands as an integral part of the territory of the United States" (Congressional Record, 55th Congress, Third Session, Volume 32, page 1847).

The court held that even though the inhabitants of the Philippines were not citizens and even though there was this specific Congressional declaration to the effect that the possession of the Philippines was on a temporary basis, the Philippine Islands were not a foreign country within the meaning of the tariff law.

statute affecting the relation of this government and private persons; nor can it be escaped that the cession of the leased areas was actually made—both grant and occupancy—long prior to the enactment of the Tort Claims Act.

POINT III

There has been a Congressional expression of intent that the Federal Tort Claims Act should apply to the leased areas.

The Government seems to argue from *Foley Brothers* v. *Filardo*, 336 U. S. 281, 285, that the Court should resort to a presumption of territoriality in connection with the Federal Tort Claims Act. As this Court said there, such an approach is only valid where there is unexpressed Congressional intent. In the instant case Congress has almost as a textual matter expressed an intent that the Tort Claims Act should apply within the territorial limits of the United States, in all of the Territories and possessions of the United States including, of course, its leased areas, and in fact everywhere except "that it shall not apply to any claim arising in a foreign country." The choice of language is far more eloquent than the silence on territorial application which was the nucleus for the principle in *Foley Brothers* v. *Filardo*, *supra*.

Moreover, evidence that the leased areas were specifically in contemplation of Congress in the enactment of the Tort Claims Act is found in the original jurisdictional provisions thereof, which provided that district courts in the Territories and possessions of the United States were appropriate forums for the institution of these suits.

The opinion of the Court of Appeals (R. 21) aptly points out, that although the district courts are spelled out in the statute (Title 28, U. S. Code 1346(b)) to designate those

of Alaska, the Canal Zone and the Virgin Islands, the revision obviously was not intended to limit the coverage of the Act and therefore "the reference to the original form is of importance as indicating a Congressional recognition of claims in the 'possessions' of the United States."

It does not serve to deny that recognition by insisting that no courts have in fact been established in the leased areas. The fact of the matter is that such courts may be established in the leased areas at any time (see Article IV of the Executive Agreement with Great Britain).[16]

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16 Congressional reports recognize that civil courts have not been established in the leased areas only because of practical difficulties. The report of the Senate Committee on Naval Affairs (Senate Report #26, January 28, 1943, U. S. Code Congressional Service, pp. 2 to 8) recommended favorable consideration of a bill which extended Naval courts martial to certain persons in leased areas outside the continental limits of the United States. This bill became law on March 22, 1943 (34 U. S. C. A. 1201). The report pointed out that a similar law had already been passed for civilians accompanying the armed forces without the territorial jurisdiction of the United States (Article 2(d) of the Articles of War, 41 Stat. 787, 10 U. S. C. 1473 (d).). The report points out (page 8):

> "The President has stated that civil courts will not be established in leased areas beyond the territorial jurisdiction of the United States.
>
> "There are many practical difficulties connected with the administration of justice in the outlying islands through the civil courts, when such islands are occupied in time of war or national emergency almost solely by the armed forces and persons accompanying or serving them.
>
> It is highly desirable to provide during such time for the administration of justice in these areas in the cases of civilians offending against naval laws, and also to have civilians employed in adjacent areas by the Army and Navy, respectively, or by their contractors, amenable to similar laws, jurisdiction, and courts."

POINT IV

There is no discernible legislative purpose to exclude all claims based on foreign law.

The Petitioner seeks, by a painstaking review of the legislative history of the various Tort Claims Acts, to demonstrate that Congress had in mind an intention not to make claims against the United States justiciable under foreign law. This review, while of unquestioned thoroughness, is of little assistance to the Petitioner's thesis. It is true that at the time when the emphasis on tort liability was shifted in the drafts to local law, Mr. Shea, an Assistant Attorney General in charge of the Claims Division said (Hearings before the Committee of the Judiciary, House of Representatives, 77th Congress, 2nd Session, on H. R. 5373 and H. R. 5463 — page 35) that claims arising in a foreign country have been exempted from the bill whether or not the claimant is an alien. He added that it was wise because of the emphasis on local law to restrict coverage to claims arising in this country. The lack of geographical significance of his comment as it bears on the present case is underscored by the fact that what Mr. Shea said was immediately interpreted by the Committee to mean that any representative of the United States who committed a tort in a foreign country such as England could not be reached under the Act."

17. Immediately after Mr. Shea's explanation of the change, Representative Robsion said:

"As I understand, that any representative of the United States who committed a tort in England or some other country could not be reached under this?"

Mr. Shea: "That is right. . . ."

The Petitioner has omitted from the legislative history the one occasion on which the geographical extensity of the Act's coverage was specifically and directly discussed. At a meeting of the sub-committee of the Senate Committee on the Judiciary which was considering a predecessor Tort Claims Act, S. 2690, 76th Congress, 3rd Session, J. J. Keegan, a member of the U. S. Employees Compensation Commission, testified. The exclusion at that time read as follows:

> "Any claim arising in a foreign country in behalf of an alien."

Mr. Keegan said (page 55):

> "The exceptions overlook an important provision. There is no geographical limitation as to the application of the measure. The absence of such a provision would make the bill very difficult of administration beyond the geographical limits of the United States and its possessions."

Mr. Keegan thereupon offered an amendment, which was duly printed (page 65), reading:

> "This Act shall be applicable only to damage or injury occurring within the geographical limits of the United States, Alaska, Hawaii, Puerto Rico, or the Canal Zone."

The amendment was not adopted either in terms or in substance.

It is therefore to be observed that an amendment was offered which would have given the very result contended for here by the Government.

> That amendment was rejected, indicating an intention on the part of Congress to extend its tort liability beyond the geographical limits of the United States, Alaska, Hawaii, Puerto Rico and the Canal Zone and, in fact, to include all territories except foreign countries.

Nor can it be said that Congress was at a loss to describe the leased areas in terms other than as "foreign countries." The Tort Claims Act was passed by the 79th Congress. The first session of the 77th Congress passed, and the 78th Congress amended, the Foreign Claims Act, which contained the appropriate language for references to the leased areas. After a predecessor Congress had passed one law, namely: the Foreign Claims Act, which applied to a "foreign country, including places located therein which are under the temporary or permanent jurisdiction of the United States" (55 Stat. 880, amended 57 Stat. 66, 31 U. S. C. 224(d)) would it not be entirely reasonable, if Congress had intended to exclude claims arising in the leased areas, to state "the provisions of this title shall not apply to any claim arising in a foreign country, including places located therein which are under the temporary jurisdiction of the United States"?

The changes made by the revision of the Judicial Code in 1948 may not be considered as any evidence of original Congressional intent. In fact, the decision of the District Court on February 11, 1948 in this very case (R. 10) antedated the adoption of the revision.[18]

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18 Frank J. Parker, Chief Assistant United States Attorney in the Eastern District, who appeared for the Petitioner here in the District Court and in the Court of Appeals, was a member of the revision staff representing the combined editorial staffs of the Edward Thompson Company and West Publishing Company, which actually drafted the revision to Title 28. The revision of Title 28 did not pass Congress until June 12, 1948, which was five months after the *Spelar* case was decided and more than a year after the action was commenced.

POINT V

The Petitioner has consented to the continued application of the Newfoundland death statute in the leased area and there is no anomaly in having its liability as a tortfeasor adjudicated thereunder.

The Tort Claims Act provides that the liability of the United States to tort claimants for damage, loss, injury or death shall be governed by the "law of the place where the act or omission occurred."

The Complaint filed by the Respondent alleged and offered to prove the death statute of Newfoundland (R. 6), which provides:

> "1. Whensoever the death of a person shall be caused by any wrongful act, neglect, or default, and the act, neglect, or default, such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony.
>
> 2. Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased."

It will be observed that the death statute is the Lord Campbell's Act which preserves actions for wrongful death in many, if not the majority, of the states of the United States.

Under the Executive Agreement of March 27, 1941, which clearly contemplated general legislative control over the leased area to the United States, the parties also agreed in Article XXIX:

> "During the continuance of any lease no laws of the Territory which would derogate from, or prejudice any of the rights conferred on the United States by the lease or by this agreement, shall be applicable within the leased area, save with the concurrence of the United States."

No wrongful death statute has ever been enacted by the United States to cover the leased areas, although the problem of providing machinery for compensating injuries in these areas was considered by Congress, and the power to legislate on that subject was exercised as early as 1942, when the provisions of the Longshoremen's and Harbor Workers Compensation Act was made applicable to civilian employees in the leased areas.[19]

Since the death statute of Newfoundland is in line with the policy of many of the states on wrongful death and since Congress has the power to pass some other death statute or even to repeal the Newfoundland death statute in the leased area, it would seem that the United States has concurred in the continuance of the Newfoundland death statute for the leased areas. It appears to be one of the established principles of international law moreover that when legislative sovereignty is changed, as it was clearly changed in this instance, the private rights of in-

19 Defense Base Act, 56 Stat. 1028; 42 U. S. C. 1651 (1942). It is interesting to note that Congress itself recognized, in connection with the passage of this Act, that it had the supreme power to legislate in the leased areas, for it made the liability of any employer under the Defense Base Act exclusive of all other liability . . . under the Workmen's Compensation Law of any state, territory or other [illegible] applied.

inhabitants are unaffected by the change and existing private law, as opposed to public law, continues until altered by the new sovereignty[20] (or sovereignties if the Petitioner chooses).

Even though the unsupported assumption be made that Congress had in mind that tort liability of the United States should not be determined by the laws of a foreign country, the death statute under which the claimant is suing here is in truth and fact a death statute in operation by the leave and sufferance of the United States. In that sense, the death statute is not the death statute of a foreign country but is rather the death statute of the Petitioner. The death statute, rather than being that of Newfoundland is the death statute of the United States for that particular leased area.

POINT VI

The Petitioner has in fact asserted legislative, administrative and judicial control over the leased areas and cannot now be heard to assert that they are foreign countries.

A

Legislative

As we have seen, Congress has legislated in the leased areas. The Defense Base Act, passed during the 1st Session of the 77th Congress and amended the following session, specifically applies to "any military, air or naval base

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20 *United States* v. *O'Donnell*, 58 S. Ct. 708, 303 U. S. 501; *Shapleigh* v. *Mier*, 57 S. Ct. 261, 229 U. S. 468, 113 A. L. R. 253; *Flensburger Dampfercompagnie* v. *United States*, 59 F. (2d) 464, cert. den.; *United States* v. *Flensburger Dampfercompagnie*, 52 S. Ct. 645, 286 U. S. 564

acquired after January 1, 1940 by the United States from any foreign country" (55 Stat. 622, amended 56 Stat. 1035; 42 U. S. C. 1651).

The War Damage Act, passed by the 2nd Session of the 77th Congress applies to "such property situated in the United States, including the several states and the District of Columbia, the Philippine Islands, the Canal Zone, the territories and possessions of the United States, and any such other places as may be determined by the President to be under the domination and control of the United States" (56 Stat. 174, 176; 15 U. S. C. 606(b)(2)).

The Foreign Claims Act, passed by the 1st Session of the 77th Congress and amended during the 78th Congress, applies to a "foreign country, including places located therein which are under the temporary or permanent jurisdiction of the United States" (55 Stat. 880, amended 57 Stat. 66; 31 U. S. C. 224(d)).

The Fair Labor Standards Act of 1938, 29 U. S. C. A. 201 *et seq.* was judicially declared to apply in the leased areas although passed prior to the acquisition of the bases and although the geographical area for coverage was considerably more limited, the language being to "employees engaged in interstate commerce in any state of the United States or the District of Columbia, or any territory or possession of the United States" (29 U. S. C. A. 203(b) and (c)).

Similar Brown v. Connell, (supra).

B

Administrative

The statutes above referred to have so important instances required the exercise of administrative functions in the leased areas, but we single out the investigation of the Civil Aeronautics Board of the very accident in which the Respondent's husband lost his life as representing the common acceptance by the Petitioner of the fact that the leased areas are not foreign countries. Title 7 of the Civil Aeronautics Act (49 U. S. C. A. 581, 582) is silent as to the geographical extent of the jurisdiction of the Civil Aeronautics Board. The statute imposes a duty on the Civil Aeronautics Board to "investigate such accidents and report the facts, conditions, and circumstances relating to each accident, and the probable cause thereof" (49 U. S. C. 582(2)).

Without any hesitation or requests for advisory opinions, the Civil Aeronautics Board properly, we believe, immediately put its machinery into motion and investigated the crash in which the Respondent's husband was killed and marshalled the evidence, including exhibits, and this was obviously done with the complete knowledge of the Newfoundland Government.

C

Judicial

As we have previously seen, the Executive Agreement contemplated the possibility of the establishment of a United States District Court in the leased area. The record shows that such civil courts were not established only because of practical difficulties, since the leased areas were occupied

in time of war and national emergency almost entirely by the armed forces and persons accompanying them or serving them (Senate Report 2230, January 28, 1948, 1 U. S. Code Congressional Service p. 811). The judicial system of courts martial was therefore made applicable in the leased areas.

POINT VII

There are no reasons of policy to warrant the exclusion of the leased areas from the coverage of the Tort Claims Act.

In *Vermilya Brown* v. *Connell*, *supra*, and *Foley Brothers* v. *Filardo*, *supra*, the Court was construing the geographical extent of statutes having to do with labor conditions and there were therefore present in those cases problems of high international, and critical domestic policy.

In the present case the only persons even remotely involved are persons receiving injury in the leased areas at the hands of the Petitioner. To hold that the leased areas are covered by the Act would be in direct line with the benevolent purposes of the legislation without any concomitant difficulty to the Petitioner. The defense of an action arising in a leased area imposes no more difficulty upon the United States than would the defense of an action in any other part of the United States. The means of investigation and report are at the disposal of the Petitioner. The statutes which might affect the Petitioner's liability, such as the death statute, are subject to its control. The number of people and type of people who might be in the leased areas are, as a practical matter, under its control. Why then should the Court indulge in the fiction that these leased areas are foreign countries so as to deprive tort claimants of their day in court? We cannot see that any

useful purpose will be served to the Petitioner or its information relations by informing the rest of the world that although we consider the leased areas our possessions insofar as the responsibilities of private individuals are concerned, they nevertheless remain foreign countries where the Petitioner's responsibilities as a sovereign become involved.

CONCLUSION

It is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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